Google Inc. et al v. Egger et al Doc. 333 Att. 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALI S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD, RACHEL MEEROPOL,

Plaintiffs,

v.

GEORGE W. BUSH, President of the United States; NATIONAL SECURITY AGENCY, LTG Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, LTG Michael D. Maples, Director; CENTRAL INTELLIGENCE AGENCY, Porter J. Goss, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JOHN D. NEGROPONTE, Director of National Intelligence,

Defendants.

Case No. 06-cv-313

Judge Gerard E. Lynch
Magistrate Judge Kevin N. Fox

AFFIRMATION OF WILLIAM GOODMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, William Goodman, an attorney admitted to practice before this Court, and the Courts of the State of New York, hereby affirm under penalty of perjury as follows:

1. I am the Legal Director of the Center for Constitutional Rights ("CCR"), a nonprofit public interest law firm in New York. I, along with Shayana Kadidal, a staff attorney at CCR, David Cole, a CCR board member, and Michael Avery of the National Lawyers Guild are counsel for the Plaintiffs in this action.

Dockets.Justia.com

2. I am a member of the bars of the State of New York and the United States District Court for the Southern District of New York.

3. I have spent the last 40 years prosecuting civil rights and civil liberties litigation. For 33 of those years I was in private practice, as an associate and then partner at Goodman, Eden, Eden, Millender, and Bedrosian, in Detroit, Michigan, and from 2003 to 2005 as a partner at Moore & Goodman, LLP in New York City.

4. From 1998-2003, I was Legal Director of CCR. I returned to CCR as Legal Director in 2005. In my capacity as legal director, I am responsible for directly supervising the ten attorneys and four legal workers in CCR's Manhattan office, as well as the work of a large number of volunteers and cooperating attorneys worldwide. I directly supervise all of the named individuals who are Plaintiffs in this action, and am familiar with their work on the cases described herein. As supervisor of the legal staff, my responsibilities include setting policies regarding compliance with our professional responsibilities as a law office. The Legal Director bears primary responsibility for selecting cases and ensuring their effective litigation, and also participates in the overall direction and administration of the office with particular attention to litigation needs and budget.

5. The Center for Constitutional Rights is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR is committed to the creative use of law as a positive force for social change. CCR considers litigation to be not merely a tool for advancing precedent but also a fulcrum around which to organize mass movements for political change and a means of giving voice to the aspirations of oppressed

peoples. Over the past 39 years CCR has litigated cutting-edge cases in the areas of racial justice, government misconduct, social and economic rights, women's rights, separation of powers, and international human rights. Among these is the landmark wiretapping case *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

6. CCR and the individual lawyers employed at the Center have served as counsel in many cases alleging violations of constitutional and human rights as a result of the detention and interrogation practices of the current administration in connection with anti-terrorism policies and practices. For instance, the Center for Constitutional Rights litigated, with others, the Supreme Court case challenging the indefinite detention of foreign nationals at Guantánamo Bay Naval Station, *see Rasul v. Bush,* 542 U.S. 466 (2004), and continues to coordinate the representation of approximately 500 Guantánamo Bay detainees in conjunction with some 500 *pro bono* attorneys across the country. CCR is also co-counsel on a civil suit brought on behalf of four released former Guantánamo detainees, *Rasul v. Rumsfeld*, 04-cv-1864 (RMJ) (D.D.C.). CCR has also developed a large group of *pro bono* translators and interpreters, and local contacts among legal and human rights organizations across the world, and we continue to lead and coordinate efforts among these persons. The overwhelming majority of clients in these cases are represented by CCR *pro bono*, with no expectation that they will ever be in a position to pay even the out-of-pocket litigation expenses CCR incurs in the course of their representation.

7. Plaintiff attorneys Gitanjali S. Gutierrez and Tina Foster communicate regularly with family members of the detainees (many of whom serve as next friends to detainees in the habeas proceedings), potential witnesses in the habeas cases, human rights workers and officials of foreign governments located in the detainees' home countries, former detainees who have been released and returned to their home countries, and cooperating counsel, located both inside

and outside of the United States, who are litigating individual cases. Plaintiff Foster also routinely is required to communicate with translators and interpreters located overseas in the course of her work on these cases. Some of the people Plaintiffs Foster and Gutierrez communicate with in connection with their legal work either have officially been deemed by the United States as “enemy combatants,” and therefore fit within the criteria articulated by Attorney General Gonzales for targets of the NSA Surveillance Program (described in our complaint in this action), or are reasonably likely to be viewed by the United States as fitting within those criteria. For instance, Ms. Gutierrez regularly communicates by telephone with Moazzam Begg and Feroze Abassi, both of whom are released former Guantánamo detainees who were not only designated as “enemy combatants” but also were among the first six Guantánamo detainees designated (in July 2003) for trial by military commission. Both men currently live in England.

8. Plaintiff Seema Ahmad is a legal worker at the Center whose primary job responsibilities also involve coordination of the habeas petitions for Guantánamo detainees. Ms. Ahmad communicates regularly with family members of the detainees, cooperating counsel, human rights lawyers located overseas, former detainees, and other individuals in relation to these cases. Some of the people she communicates with in connection with her legal team duties either have officially been deemed by the United States as “enemy combatants,” and therefore fit within the criteria articulated by Attorney General Gonzales for targets of the NSA Surveillance Program, or are reasonably likely to be viewed by the United States as fitting within those criteria. For instance, Ms. Ahmad regularly communicates by telephone and email with Moazzam Begg.

9. Plaintiffs Gutierrez, Foster and Ahmad participate in frequent training and joint strategy sessions with other counsel on the Guantánamo cases. These meetings generally involve

some lawyers attending in person, and others conferencing in via videoconference technology or telephonic conference calls. Co-counsel or other participants frequently use such means to call into these meetings from overseas. Counsel on the Guantánamo cases also rely heavily on an email listserv and a private extranet site (accessible via the Internet) to coordinate their efforts in the cases.

10. Plaintiff Maria LaHood is a staff attorney at the Center for Constitutional Rights responsible for litigating a number of cases in CCR's International Human Rights docket, including *Arar v. Ashcroft*, 04-CV-0249 (DGT)(VVP) (E.D.N.Y. filed January 22, 2004), a case on behalf of a Syrian-born Canadian citizen detained in New York while changing flights at JFK Airport and sent by United States officials to Syria to be tortured. In the course of her work on that case she communicates frequently by phone and e-mail with the plaintiff, Maher Arar, who lives in Canada (and is barred from entering the United States until at least October 2007), as well as with others abroad. The United States government continues to assert that Mr. Arar is a member of al Qaeda (a charge he denies), and therefore Mr. Arar fits within the criteria for targets of the NSA Surveillance Program described by Attorney General Gonzales.

11. CCR attorneys are also litigating *Turkmen v. Ashcroft*, 02 CV 2307 (JG)(SMG) (E.D.N.Y.), a civil action on behalf of a number of Muslim non-citizens of Arab or South Asian extraction detained shortly after 9/11, ostensibly on immigration grounds; labeled "of interest" to the 9/11 terrorism investigation; and subjected to unlawfully prolonged detention so that they could be investigated for links to terrorism before being returned to their home countries. Plaintiffs have moved for class certification and CCR is attempting to identify additional class members. Given the United States' identification of these plaintiffs as "of interest" to the 9/11

investigation, they have reason to believe that they fall within the criteria for the NSA Surveillance Program set forth by Attorney General Gonzales.

12. Plaintiff Rachel Meeropol is a staff attorney at the Center for Constitutional Rights responsible for litigating cases in the Center's prisoners' rights docket, and serves as lead counsel in *Turkmen v. Ashcroft*, 02-CV-2307 (E.D.N.Y.). In her capacity as an attorney at the Center, Ms. Meeropol routinely discusses matters by telephone or email with potential clients overseas. In the course of her work on the *Turkmen* case she communicates with the named plaintiffs and potential class members, all of whom now live overseas, via both e-mail and telephone calls. Some of the individuals outside the United States Ms. Meeropol communicates with are likely to be viewed by the United States as fitting within the broad criteria for NSA surveillance outlined by Attorney General Gonzales.

13. Since the public disclosure of the existence of the NSA Program, the *Turkmen* plaintiffs have submitted an interrogatory to the United States requesting that it disclose "whether any telephone, email or other communication between any plaintiff and his counsel was monitored or intercepted since the plaintiff's removal from the United States" and to "state the date and time of the communication monitored, state the form of the communication monitored, identify the individuals involved, and identify each person who authorized such monitoring." *See* Plaintiffs' Second Set of Interrogatories and Request for Production of Documents to the United States (Feb 22, 2006) at 5, interrogatory 9 (appended as Exhibit 1 to this Affirmation). The United States has opposed this discovery request, *see* Stephen E. Handler, Letter (Feb 28, 2006) at 2 (appended as Exhibit 2 to this Affirmation), and Plaintiffs have already been forced to the effort of challenging this refusal to respond before the court, arguing the matter during a status conference held on March 7, 2006.

14. On January 18, 2006, in an effort to learn more about whether CCR and its staff had been subject to eavesdropping under the Program, CCR submitted FOIA requests concerning the Program to a number of federal government agencies either involved directly in carrying out surveillance under the Program or with which intelligence gathered under the Program has been reportedly shared, including Defendant agencies the NSA, FBI, CIA, DIA, and DHS, as well as the Department of Justice, the Department of the Army and the Department of the Navy. These FOIA requests were submitted on behalf of both CCR as an organization and a number of individual employees and board members of the Center, as well as 108 pro bono volunteer, cooperating and co-counsel attorneys throughout the United States who work or have worked with CCR. (A copy of one of these requests is attached to this Declaration as Ex. 3.) The FOIA requests demand that the agencies turn over, *inter alia*, all "records obtained through or relating to ongoing or completed warrantless electronic surveillance ... regarding or concerning any Requesting Party" including records that "reference, list, or name any Requesting Party." Substantial expenditures of staff time and effort were involved in preparing and executing these FOIA requests, including the work involved in drafting and reviewing the request, the effort to obtain written authorizations from the numerous outside counsel and other non-staffers who do not work in CCR's office, and the task of preparing, assembling and mailing the actual requests (including copies of these authorizations), which required two paid staffers working for an entire day to complete, plus substantial work from a volunteer intern who had a limited period of time to devote to working with CCR.

15. The revelation that the government has been carrying on widespread warrantless interception of electronic communications, especially of international communications, has impaired the ability of CCR's legal staff to communicate via telephone and email with their

overseas clients, witnesses, co-counsel, and other persons, out of fear that their privileged communications are being and will be overheard by the NSA Surveillance Program. As a matter of professional ethics in our role as attorneys, CCR is obligated to take reasonable and appropriate measures to reduce the risk of disclosure of client confidences and work product, since we have been apprised that a program of unlawful electronic surveillance by the government exists and that the program is targeted at a category of persons that includes—from the government's perspective—some of our clients. The risk that our conversations are being overheard has forced CCR's legal staff to institute protective measures to reduce the potential impact of such surveillance on our representation of our clients, including not communicating with certain individuals at all by phone or email, and avoiding subjects central to the attorney-client relationship and work product in electronic communications with others. CCR's legal staff in some instances will have to travel outside the country to avoid the risk of jeopardizing the confidentiality of privileged communications. In other cases we have had to and will continue to have to delay certain communications until an in-person visit or other mode of communication secure against eavesdropping under the NSA Program can be arranged and takes place. The other modes of communication available to us are inadequate substitutes for the use of the telephone and email: travel is time-consuming, expensive, and cannot be done every time a strategic decision or consultation is necessary; the use of the mails or courier services may present other security issues, and do not permit either the ready back-and-forth counseling inherent in any attorney-client relationship or the sort of probing inquiry essential to any investigative enterprise. As a result, we are suffering irreparable harm to our ability to communicate with persons essential to our litigation and advocate vigorously on our clients' behalf.

16. In direct response to the revelation of the existence of the NSA Program, I issued a directive at a legal meeting on January 4, 2006, which was repeated at a second legal meeting on January 11, and followed by a confidential memorandum to CCR's legal staff, other staff, and cooperating counsel on February 11, 2006. I asked that the entire legal staff undertake the following tasks: endeavor to review all sensitive communications to overseas clients, witnesses and other litigation participants during the period since the commencement of the NSA Program; try to recall the participants in, and the contents of, these sensitive communications; evaluate the risks to the participants and the litigation if such communications had been subject to surveillance; if the risk is high, take corrective action, if possible, or discuss possible corrective action with the directors; and, if appropriate, move for disclosure of any such surveillance in the appropriate cases.

17. All of the individual named Plaintiffs—Ms. Gutierrez, Ms. Foster, Ms. Ahmad, Ms. LaHood and Ms. Meeropol—have traveled internationally in the course of their work with the Center. During these trips, other attorneys and employees of the Center routinely need to communicate with them concerning work-related matters via email or telephone.

18. All of the individual named Plaintiffs have had the need to communicate with other non-CCR lawyers located outside the United States, including both co-counsel and other attorneys CCR wishes to consult with.

19. In short, we have had to divert staff time and organizational resources away from core mission tasks in order to respond to the NSA Program, including the need to review past sensitive communications that may have been surveilled by the Program, the need to draft and litigate discovery requests concerning possible surveillance, and the need to travel abroad and take other measures in order to safeguard the confidentiality of communications. This diversion

of resources hurts our organization by reducing the number of cases we can bring, and undermines our ability to litigate our existing cases in the most effective manner.

20. Appended to this affirmation as exhibits are true and accurate copies of the following documents: (1) Plaintiffs' Second Set of Interrogatories and Request for Production of Documents to the United States, *Turkmen v. Ashcroft*, 02-CV-2307 (E.D.N.Y.) (Feb 22, 2006), as Ex. 1; (2) Letter from Stephen E. Handler, attorney for the United States, *Turkmen v. Ashcroft*, 02-CV-2307 (E.D.N.Y.)(Feb 28, 2006), as Ex. 2; (3) CCR FOIA request of January 18, 2006; (4) President Bush, Radio Address (Dec. 17, 2005); (5) *Press Conference of President Bush* (Dec. 19, 2005); (6) Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to congressional leaders, December 22, 2005; (7) *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005; (8) Michael Hayden, *Remarks at the National Press Club on NSA Domestic Surveillance* (Jan. 23, 2006); (9) *Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee*, 109th Congress (Feb. 6, 2006).

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

William Goodman, Esq.

Dated: March 9, 2006

EXHIBIT 1

Plaintiffs' Second Set of Interrogatories and Request for Production of Documents to the United States, *Turkmen v. Ashcroft*, 02-CV-2307 (E.D.N.Y.) (Feb 22, 2006)

Rachel Meeropol (RM 3878)
Matthew Strugar (MS 2053)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6432

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFFI; SYED AMJAD ALI JAFFRI; YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; AKHIL SACHDEVA; and ASHRAF IBRAHIM, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director of the Federal Bureau of Investigation; JAMES W. ZIGLAR, Commissioner of the Immigration and Naturalization Service; DENNIS HASTY, former Warden of the Metropolitan Detention Center (MDC); MICHAEL ZENK, former MDC Warden; MDC Associate Warden for Custody SHERMAN; MDC Captain SALVATORE LOPRESTI; MDC Lieutenants STEVEN BARRERE, WILLIAM BECK, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, STUART PRAY, and ELIZABETH TORRES, and MDC Correctional Officers PHILLIP BARNES, SIDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, JOHN OSTEEN, BRIAN RODRIGUEZ, SCOTT ROSEBERY, and CHRISTOPHER WITSCHEL, MDC Counselors RAYMOND COTTON, JAMES CUFFEE, and CLEMMET SHACKS; JOHN DOES 1-20, Metropolitan Detention Center, Corrections Officers, and the UNITED STATES,

Defendants.

02 CV 2307 (JG) (SMG)

PLAINTIFFS' SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO THE UNITED STATES

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and the Local Rules of the Court, Plaintiffs Ibrahim Turkmen, Asif-ur-Rehman Saffi, Syed Amjad Ali Jaffri, Yasser Ebrahim, Hany Ibrahim, Shakir Baloch, and Akhil Sachdeva, by counsel, hereby request that defendant the United States produce for inspection and copying, at the offices of Covington & Burling, 1330 Avenue of the Americas, New York, NY 10019, on or before March 22, 2006, all documents and tangible things within their possession, custody or control described in the following requests.

This request incorporates the Rules of the United States District Courts for the Southern and Eastern Districts of New York, including but not limited to Rule 26.2 (Assertion of Claim of Privilege), Rule 26.3 (Uniform Definitions in Discovery Requests) Rule 26.5 (Cooperation Among Counsel in Discovery), and Rule 26.7 (Discovery Requests to Be Read Reasonably).

DEFINITIONS

1. "OIG" refers to the United States Department of Justice Office of the Inspector General.

2. "OIG Report" refers to the report of the OIG issued in June 2003 entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks."

3. "BOP" refers to the United States Bureau of Prisons.

4. "FBI" refers to the United States Federal Bureau of Investigation.

5. "CIA" refers to the United States Central Intelligence Agency

6. "MDC" refers to the Brooklyn Metropolitan Detention Center.

7. “PENTTBOM Investigation” refers to the investigation conducted by law enforcement personnel, including agents of the Federal Bureau of Investigation, into the coordinated attacks on September 11, 2001.

8. “September 11 detainees” refers to those aliens arrested for immigration violations in connection with the PENTTBOM Investigation and held at the MDC.

9. “Defendant” refers to the United States.

10. “Name check” refers to the process of searching for an individual’s name in a database, including but not limited to CIA terrorist databases and FBI criminal history databases.

INSTRUCTIONS

1. If a document or tangible thing is called for under more than one request, it should be produced in response to the first request and a notice appended to it stating the other request to which it is claimed that such document is responsive.

2. If copies or drafts exist of documents the production of which has been requested herein, produce and submit for inspection and copying each and every copy and draft which differs in any way from the original document or from any other copy or draft.

3. Any response to these requests shall set forth the request in full before each response.

4. Except as otherwise stated, this request calls for the production of all documents and tangible things concerning occurrences from and including September 11, 2001 to the present. For instance, where a request calls for the production of documents

concerning policies or practices in effect, all documents concerning policies or practices in effect during the foregoing time period are to be produced, without regard to when the documents were created.

5. In producing documents, all documents that are physically attached to each other shall be produced in that form. Documents that are segregated or separated from other documents, whether by inclusion in binders, files or sub-files, or by the use of dividers, tabs or any other method, shall be produced in that form. Documents shall be produced in the order and form in which they were maintained.

6. Electronic documents or computerized data compilations shall be produced in electronic form and shall include the software or instructions necessary to retrieve, read, or interpret such information.

INTERROGATORIES

1. Identify all employees and agents of the United States who traveled in the vehicle transporting Hany Ibrahim to the MDC on or about October 1, 2001, including but not limited to the driver and any accompanying guards.

2. Identify all employees and agents of the United States who traveled in the vehicle transporting Yasser Ebrahim to the MDC on or about October 1, 2001, including but not limited to the driver and any accompanying guards.

3. Identify all employees and agents of the United States who traveled in the vehicle transporting Asif-ur-Rehman Saffi to the MDC on or about October 1, 2001, including but not limited to the driver and any accompanying guards.

4. Identify all employees and agents of the United States who traveled in the vehicle transporting Syed Amjad Ali Jaffri to the MDC on or about September 29, 2001, including but not limited to the driver and any accompanying guards.

5. Identify all employees and agents of the United States who traveled in the vehicle transporting Shakir Baloch to the MDC on or about September 21, 2001, including but not limited to the driver and any accompanying guards.

6. Identify all employees and agents of the United States who traveled in the vehicle transporting Ashraf Ibrahim to the MDC on or about September 23, 2001, including but not limited to the driver and any accompanying guards.

7. State whether any conversation between any plaintiff and his counsel was monitored by video surveillance during the plaintiff's detention at MDC. If yes, state the date and time of the surveillance, identify the plaintiff and counsel involved, and identify each person who authorized such surveillance.

8. State whether any conversation between any plaintiff and his counsel was monitored by audio surveillance during the plaintiff's detention at MDC. If yes, state the date and time of the surveillance, identify the plaintiff and counsel involved, and identify each person who authorized such surveillance.

9. State whether any telephone, email or other communication between any plaintiff and his counsel was monitored or intercepted since the plaintiff's removal from the United States. If yes, state the date and time of the communication monitored, state the form of the communication monitored, identify the individuals involved, and identify each person who authorized such monitoring.

10. State whether there was any monitoring, videotaping or audiotaping of the inside of the rooms plaintiffs stayed in during the week of their deposition in the United States. If yes, state the nature of this surveillance, and identify each person who authorized such monitoring.

11. State whether there are any recordings, transcripts, notes or other documents recording in whole or in part the words or substance of any conversation monitored or intercepted as described in Interrogatory 7, 8, 9 or 10. If so, identify each such recording and document, and its custodian.

12. If any document requested herein was at one time in existence, but has been lost, discarded or destroyed, identify such document as completely as possible, providing as much of the following information as possible:

a. The type of document;

b. Its date;

c. The date or approximate date it was lost, discarded, or destroyed;

d. The circumstances and manner in which it was lost, discarded or destroyed;

e. Its contents and/or subject matter;

f. The identity of all persons having knowledge of the contents thereof.

REQUESTS FOR PRODUCTION

1. All documents related to the basis of defendant's determination to detain any plaintiff subject to the "hold until cleared" policy, as described in the OIG Report, in connection with the PENTTBOM Investigation.

2. All documents related to any plaintiff's inclusion on the "INS

Custody List(s)" created by the FBI during its PENTTBOM Investigation.

3. All documents which concern the basis upon which plaintiffs were included on the "INS Custody List(s)" created by the FBI during its PENTTBOM Investigation.

4. All documents related to any name check concerning any plaintiff conducted during the PENTTBOM Investigation, including but not limited to a name check conducted by the CIA.

5. All documents related to the date a name check concerning any plaintiff was conducted during the PENTTBOM Investigation, including but not limited to the date a name check was conducted by the CIA.

6. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning Hany Ibrahim or his removal from the United States, made up to or about the time of his removal.

7. All documents constituting, recording, or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Hany Ibrahim.

8. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning Yasser Ebrahim or his removal from the United States, made up to or about the time of his removal.

9. All documents constituting, recording, or reflecting any

communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Yasser Ebrahim.

10. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning Asif-ur-Rehman Saffi or his removal from the United States, made up to or about the time of his removal.

11. All documents constituting, recording, or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Asif-ur-Rehman Saffi.

12. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning Syed Amjad Ali Jaffri or his removal from the United States, made up to or about the time of his removal.

13. All documents constituting, recording, or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Syed Amjad Ali Jaffri.

14. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or

employee of any foreign country concerning Shakir Baloch or his removal from the United States, made up to or about the time of his removal.

15. All documents constituting, recording, or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Shakir Baloch.

16. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning Ashraf Ibrahim or his removal from the United States, made up to or about the time of his remvoal.

17. All documents constituting, recording, or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Ashraf Ibrahim

18. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning Ibrahim Turkmen or his removal from the United States, made up to or about the time of his removal.

19. All documents constituting, recording, or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Ibrahim Turkmen.

20. All documents constituting, recording or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning Akhil Sachdeva or his removal from the United States, made up to or about the time of his removal.

21. All documents constituting, recording, or reflecting any communication between any employee or agent of the United States and any agent or employee of any foreign country concerning investigative interest in, the detention and deportation of, or any alleged connection to criminal or terrorist acts of Akhil Sachdeva.

22. All documents concerning confinement of any plaintiff in the ADMAX SHU pursuant to 28 C.F.R. § 541.23 for plaintiff's protection, including but not limited to all documents concerning (a) the assault of any plaintiff by other inmates or detainees, (b) any plaintiff's status as an informant, (c) evidence that any plaintiff received pressure from other inmates to participate in sexual activity, (d) any plaintiff's request to be placed in the ADMAX SHU for his own protection, (e) any plaintiff's refusal to enter the general population because of alleged pressure from other unidentified inmates, (f) evidence from which MDC staff had good reason to believe that any plaintiff was in serious danger of bodily harm.

23. All documents concerning any hearings conducted pursuant to 28 C.F.R. § 541.23(b) related to any plaintiff's confinement in ADMAX SHU for his own protection.

24. All documents concerning the reasons for confining any plaintiffs in ADMAX SHU for his own protection for a period exceeding 90 days, pursuant to 28 C.F.R. § 541.23(c).

25. All administrative detention orders issued by the MDC Warden or his designate concerning any plaintiff, pursuant to 28 C.F.R. § 541.22(b), without regard to whether a copy was delivered to any plaintiff.

26. All documents concerning review of any plaintiff's confinement in the ADMAX SHU by a Segregation Review Official, pursuant to 28 C.F.R. § 541.22(c)(1).

27. All documents concerning hearings conducted by a Segregation Review Official(s) to review any plaintiff's confinement in the ADMAX SHU, pursuant to 28 C.F.R. § 541.22(c)(1).

28. All documents concerning any plaintiff's waiver of the right to appear at hearings conducted by a Segregation Review Official(s).

29. In the event a copy of a the Segregation Review Officials' written decision was not provided to any plaintiff, please produce all documents concerning the determination that delivery of a copy of the decision would compromise institutional security of the MDC.

30. All documents recording, reflecting or concerning any authorization for monitoring conversations between any plaintiff and his counsel.

31. The training records maintained by the BOP concerning the following individuals: Salvatore Lopresti, Steven Barrere, William Beck, Lindsey Bledsoe, Joseph Cuciti, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, John Osteen, Brian Rodriguez, Scott Rosebery, Christopher Witschel, Raymond Cotton, James Cuffee, and Clement Shacks.

32. Any disciplinary records concerning the following individuals: Salvatore Lopresti, Steven Barrere, William Beck, Lindsey Bledsoe, Joseph Cuciti, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, John Osteen, Brian Rodriguez, Scott Rosebery, Christopher Witschel, Raymond Cotton, James Cuffee, and Clement Shacks.

33. All documents concerning grievances or other written complaints filed by any September 11 detainee wherein allegations of misconduct were made against any of the following individuals: Salvatore Lopresti, Steven Barrere, William Beck, Lindsey Bledsoe, Joseph Cuciti, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, John Osteen, Brian Rodriguez, Scott Rosebery, Christopher Witschel, Raymond Cotton, James Cuffee, and Clement Shacks.

34. All documents related to disciplinary action taken against any BOP employee as a result of allegations of abuse and/or mistreatment of any September 11 detainee confined at MDC.

35. Each written, videotaped and/or audio taped statement, and transcripts and notes of any oral statements, made by any of the following individuals to OIG investigators and/or BOP investigators, related to allegations of abuse against September 11 detainees arrested in connection with the PENTTBOM Investigation who were confined at MDC between September 11, 2001 and August, 2002: Salvatore Lopresti, Steven Barrere, William Beck, Lindsey Bledsoe, Joseph Cuciti, Howard Gussak, Marcial

Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, John Osteen, Brian Rodriguez, Scott Rosebery, Christopher Witschel, Raymond Cotton, James Cuffee, and Clement Shacks.

36. Each written, videotaped and/or audio taped statement, and transcripts and notes of any oral statements, made by any September 11 detainee to OIG investigators and/or BOP investigators, concerning allegations of abuse against September 11 detainees arrested in connection with the September 11 investigation who were confined at MDC between September 11, 2001 and August 2002.

37. All documents related to any background check performed by any agent or employee of the United States on any of the following individuals: Salvatore Lopresti, Steven Barrere, William Beck, Lindsey Bledsoe, Joseph Cuciti, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, John Osteen, Brian Rodriguez, Scott Rosebery, Christopher Witschel, Raymond Cotton, James Cuffee, and Clement Shacks.

38. All photographs and/or video tapes depicting any of the plaintiffs during their first week at the MDC including but not limited to depictions of the plaintiff's removal from the vehicles transporting them from the Varrick Street station to the MDC and the processing of plaintiffs in the "R&D" section of the MDC.

39. All photographs of any of the plaintiffs not previously produced or produced in response to ¶ 38.

40. The results of all medical tests performed on plaintiffs including but

not limited to X-Ray films, serological results, and physician's notes and reports whether or not made part of plaintiffs' medical files.

41. All documents concerning the policy and process of maintaining medical records at the MDC including, but not limited to, the preservation of notes, X-Ray films and test results whether or not made part of the inmate's medical file.

42. All documents, not already produced in this matter, maintained by the FBI, United States Department of Homeland Security, the organization formally known as the Immigration and Naturalization Service, and the BOP relating or referring to the arrest, detention, or release of any plaintiff and any proceedings in connection therewith.

Dated: New York, New York
February 22, 2006

Matthew Strugar (MS 2053)
Rachel Meeropol (RM 3878)
William Goodman (WG 1241)
Shayana Kadidal (SK 1278)
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New York, NY 10019
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EXHIBIT 2

Letter from Stephen E. Handler, attorney for the United States, *Turkmen v. Ashcroft*, 02-CV-2307 (E.D.N.Y.)(Feb 28, 2006)

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

PJP:SEHandler
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

Telephone No.
(202) 616-4279

February 28, 2006

Rachel Meeropol
Centerforconstitutionalrights
666 Broadway
New York, NY 10012

Via Regular and Electronic Mail

Re: *Turkmen, et al. v. Ashcroft, et al.*
Civil Action No. 02 CV 2307 (JG)(SMG)

Dear Ms. Meeropol:

On occasion, the United States has been amenable to responding to untimely requests for discovery so long as such requests are reasonable. However, because the discovery requests served in December 2005 and February 2006 are untimely by more than a year, seek information beyond the scope of the Court's November 19, 2004, order, and constitute an abuse of discovery, the United States objects to responding to this discovery.

Pursuant to the Court's Order, dated November 17, 2004, the parties were required "to serve written discovery requests and interrogatories by November 19, 2004." The Order also restricted "these discovery requests and interrogatories" . . . to those issues that are relevant to plaintiffs' excessive force and inhumane conditions of confinement claims." *See* Order, 11/19/04, p. 2.

"Plaintiffs' Supplemental Request for Production of Documents to the United States" was served on the United States on or about December 2, 2005. Because this discovery was served more than a year after the November 19, 2004, deadline for written discovery, it is untimely. In addition, this discovery does not comport with the restrictions set forth the Court's Order because it primarily seeks information and materials regarding Ibrahim Turkmen and Akhil Sachdeva, who do not have excessive use of force claims and who were housed at Passaic County Jail. In other words, these plaintiffs "are not currently subject to discovery in this case," which is exactly the reason you gave when you refused to respond to our written discovery requests and failed to comply with the disclosure requirements of Rule 26(a)(1). (*See* your letter, dated April 1, 2005.) For these reasons, your assertion that these requests are overdue because you "believe that many of the [requested] documents were covered in our November 19, 2004 document request to the United States. . . " *see* your December 2, 2005, letter, is baseless. Moreover, shortly after I received these requests I informed you that we were not obligated to produce any documentation that was maintained by the Passaic County Jail because it was a state facility. Accordingly, the United States will not respond to Request Nos. 1-28. However, because the current scope of discovery includes the claims of Ashraf Ibrahim, we will respond to Request No. 29.

"Plaintiffs' Second Set of Interrogatories and Request for Production of Documents to the United States" was served on the United States on February 22, 2006. Because this discovery was served more than fifteen months after the November 19, 2004, deadline for written discovery, it is also untimely. This discovery also does not comport with the limitations set forth in the Court's Order. For example, many of the production requests seek information and materials that are not limited to "plaintiffs' excessive force and inhumane conditions of confinement claims," *e.g.*, Request Nos. 1-21, 31, 37, 40, and 41. In addition, Interrogatory Nos. 9 and 10 do not pertain to any claim in the Third Amended Complaint and, therefore, are improper. Moreover, like the supplemental requests, plaintiffs impermissibly seek information and materials regarding the Passaic plaintiffs. Accordingly, the United States objects to responding to these requests.

Finally, plaintiffs' February 22, 2006, discovery requests constitute an abuse of the discovery process. Plaintiffs' claims for excessive force and inhumane conditions of confinement have remained virtually the same since this case was filed nearly four years ago. Consequently, there is no excuse for your failure to seek discovery on these claims prior to the deadline for written discovery. Furthermore, "Plaintiffs' First Set of Interrogatories to the United States" and "Plaintiffs' First Request for Production of Documents to the United States, Dennis Hasty, and Michael Zenk," which were served on November 19, 2004, contained forty-four broad and far reaching requests that sought numerous documents pertaining to the plaintiffs' incarceration at the MDC. Locating and producing the requested documents has been an arduous and time-consuming process. In fact, in this case, the United States has produced nearly 14,000 documents; this production does not include the recent disclosure of the co-defendants' personnel files and disciplinary records and the numerous documents that were produced in the *Elmaghraby* case to which the Turkmen plaintiffs have access. In addition, the United States will be supplementing its responses by producing 7,228 additional documents that include the logbooks that were maintained at the MDC, the MDC central files of Shakir Baloch, Javaid Iqbal, and Syed Jaffri, the A-file and FBI file of Ashraf Ibrahim, and the MDC's computer generated or "Sentry" documentation pertaining to the plaintiffs. Moreover, because the parties are now engaged in oral discovery, the United States also will produce, even though it is not obligated to, the A-files and FBI files of Akhil Sachdeva and Ibrahim Turkmen for purposes of preparing for their depositions which are scheduled to take place next month.

However, because the new interrogatories and forty-two new production requests are extremely late and, in many instances, mirror the requests made by the plaintiffs in the *Elmaghraby* case and seek materials that are unduly burdensome, overbroad, and are not "reasonably calculated to lead to the discovery of admissible evidence" relevant to the claims or defenses of any party, Fed.R.Civ.P. 26(b)(1), they constitute discovery abuse.

Respectfully yours,

Stephen E. Handler
Trial Attorney, Torts Branch
Civil Division

cc: Counsel of record

EXHIBIT 3

CCR FOIA request of January 18, 2006

January 18, 2006

VIA OVERNIGHT DELIVERY

National Security Agency
Attn: FOIA/PA Office (DC34)
9800 Savage Road
Suite 648
Ft. George G. Meade, Maryland 20755-6248
(fax) 301-688-6198

Re: Freedom of Information Act Request (Expedited Processing Requested)

Dear FOIA/PA Officer:

This letter constitutes a Request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq*., and corresponding regulations. This Request is submitted on behalf of the Center for Constitutional Rights, its staff and Board attorneys, and the volunteer, cooperating, and co-counsel attorneys and their staff (collectively, "Requesting Parties" or "Requesters") listed in Appendix A attached hereto. A similar request has been submitted to the following agencies, departments and units of the United States government: the Federal Bureau of Investigation, the Defense Intelligence Agency, the Central Intelligence Agency, the United States Army, the United States Navy, the Department of Homeland Security, and the Department of Justice.

1. Requesting Parties

The Center for Constitutional Rights ("CCR") is a non-profit, public interest organization that engages in litigation, public advocacy and educational programs on behalf of those who seek to challenge governmental misconduct, racial injustice, social and economic injustice and violations of international human rights law in U.S. courts, the courts of other countries and other international bodies and courts. For the past four years, lawyers and advocates at CCR have represented citizens and noncitizens identified as alleged terrorists and/or suspected of having affiliations with terrorists. These persons have been detained in places as diverse as the Metropolitan Detention Center in Brooklyn, New York; the Passaic County Jail in Patterson New Jersey; the detention center at the U.S. Naval Station in Guantánamo Bay, Cuba; the Far Falestin Branch Detention Facility of Syrian Military Intelligence in Damascus, Syria; the Sednaya Prison in Sednaya, Syria; Abu Ghraib Prison in Baghdad, Iraq; and other U.S. facilities, where they were subject to physical and psychological abuse or torture, or unlawful rendition.

This Request is made on behalf of the following CCR staff members, staff attorneys, volunteer attorneys, consultants, and Board Members who have or may have communicated with clients, families of clients, attorneys and human rights activists in foreign countries: William Goodman (a.k.a., Bill Goodman), Barbara Olshansky, Gitanjali Gutierrez (a.k.a., Gita Gutierrez), Tina Monshipour Foster (Tina Foster), Seema Ahmad, Maria LaHood, Jennifer Green (a.k.a., Jennie

Green), Shayana Kadidal (a.k.a., Shane Kadidal), Rachel Meeropol, Steven MacPherson Watt, Matthew Strugar (a.k.a., Matt Strugar) Marc Krupanski, Kelly McAnnany, Claire Tixeire, Michael Ratner, Jules Lobel, David Cole, Rhonda Copelon, Peter Weiss, Abdeen Jabara, Marilyn Clement, Charles Hay-Maestre (a.k.a., Charlie Hay-Maestre or Charley Hay-Maestre), and Jeff Hogue.

This Request is also made on behalf of 108 *pro bono* volunteer, cooperating and co-counsel attorneys and their staff throughout the United States who have worked with CCR on a variety of cases, primarily involving petitions for writs of *habeas corpus* filed on behalf of persons detained at the U.S. Naval Station in Guantánamo Bay, Cuba. These *pro bono* attorneys and their staff are listed in Appendix A.

2. Definitions

For the purpose of this Request, the following definitions shall apply:

A. "Electronic surveillance" - refers to

(a) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire, radio or other communication in any form or format of persons located within the United States obtained without benefit of warrant, including but not limited to any and all wiretaps, recordings, surveillance and/or interceptions of telephonic conversations and/or transactions (including cellular and satellite phone conversations and/or transactions), interception of e-mail conversations, or other written communications from public or non-public web sites or computer networks;

(b) the acquisition by an electronic, mechanical, or other surveillance device of non-content records obtained without benefit of warrant, from persons located within the United States that identify the existence of any communications, including but not limited to pen registers; and

(c) the warrantless installation or use of an electronic, mechanical or other surveillance device for monitoring to acquire information, other than from a wire or radio communication;[1]

B. "Records" - refers to all "records" as defined by the FOIA, 5 U.S.C. § 522(f)(2), including but not limited to existing memoranda, agreements, notes, orders, policies, procedures, protocols, written or email correspondence, faxes, files, reports, rules, technical manuals, technical specifications, training manuals, studies, analyses, audio or video recordings,

1 This request does not include surveillance authorized pursuant to Sections 1802 or 1822(a) of the Foreign Intelligence Surveillance Act. 50 U.S.C. §§ 1802 or 1822(a).

transcripts of such recordings, data, papers, guidance, guidelines, evaluations, instructions, photographs, films, recordings, books, accounts, communications and all retrievable information in computer storage, regardless of form of the record as a digital, audio, written, video, or other record;

C. "Electronic surveillance" "of persons located within the United States" - refers to records obtained through electronic surveillance of any communications by or to an individual, individuals, group or groups within the United States, regardless of whether the communication originated inside or outside the United States.

3. Records Sought

CCR and the other Requesting Parties seek disclosure of records in the possession of any office of the National Security Agency ("NSA") and any agency, organization or corporation holding records at the behest of the NSA concerning any warrantless electronic surveillance or warrantless physical searches of any person located within the United States from September 11, 2001 to the date of this FOIA Request that references a Requesting Party. In addition, CCR and other Requesters seek the disclosure of records concerning the development, approval, and implementation of the Executive's warrantless electronic surveillance and/or warrantless physical search program within the United States.

In order to ascertain the extent of the Executive's policies and practices concerning warrantless electronic surveillance and/or warrantless physical searches of persons located within the United States, Requesting Parties seek the following records:

1. All records obtained through or relating to ongoing or completed warrantless electronic surveillance or physical searches of persons located within the United States, including logs and indexes, regarding or concerning any Requesting Party and/or records of warrantless electronic surveillance or physical searches of persons located within the United States that reference, list, or name any Requesting Party;

2. Any Executive Orders authorizing the warrantless electronic surveillance or physical searches of persons located within the United States referenced in paragraph (1) above;

3. All records establishing, discussing or referencing the policies, procedures, guidelines, or practices of the NSA used to (a) identify the individuals or organizations subject to warrantless electronic surveillance or warrantless physical searches within the United States; (b) gather information through warrantless electronic surveillance or warrantless physical searches within the United States; (c) share this information with other U.S. government agencies and with foreign governments or the agencies or agents thereof; (d) share this information as a basis

for a warrant request by the U.S. Department of Justice to the Foreign Intelligence Surveillance Act Court; (e) destroy this information; and/or (f) consult with or secure approval from the U.S. Department of Justice or other departments, agencies or Executive officials prior to conducting warrantless electronic surveillance or warrantless physical searches of persons located within the United States;

4. Any records stating, discussing, or referencing the legality or propriety of warrantless electronic surveillance or warrantless physical searches of persons located within the United States, including but not limited to policy statements, memoranda, analyses, explanations, or authorizations;

5. Any Department of Justice evaluation, assessment, or audit of any NSA program implementing warrantless electronic surveillance or warrantless physical searches of persons located within the United States;

6. Any internal NSA evaluation, assessment, or audit of any NSA program implementing warrantless electronic surveillance or warrantless physical searches of persons located within the United States;

7. Any records containing concerns or comments by judges, national security officials, intelligence officials, government lawyers, or other about the NSA warrantless electronic surveillance program; and

8. All records reflecting budget allocations for all warrantless electronic surveillance or warrantless physical search programs of persons located within the United States.

4. Requesters Are Entitled to Expedited Processing

Expedited processing is warranted when an organization "primarily engage[s] in disseminating information in order to inform the public about an actual or alleged Federal Government activity" has an "urgent need" to secure the records. 32 C.R.F. § 286.4(d)(3)(ii). The Center for Constitutional Rights is an organization "primarily engaged in disseminating information" about government misconduct through the work of its staff, Board, volunteer, cooperating, and co-counsel attorneys. As described above, CCR engages in litigation, public advocacy and educational programming to defend constitutional and human rights law. Dissemination of information to the public is a crucial component of CCR's mission and work. Specifically, CCR publishes reports and newsletters, maintains a public website, issues press releases, and offers educational materials and programming to the pubic within the United States and internationally. Additionally, CCR's staff, board, and volunteer, co-counsel, and cooperating attorneys further disseminate CCR's information to their local and national communities through a variety of means, including their own press releases, interviews, reports, and educational programming.

The records in question involved the NSA's actual and alleged warrantless electronic surveillance within the United States, in apparent violation of the rights guaranteed by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. FOIA requests bearing upon alleged Constitutional violations require an immediate response in order to cease any ongoing violations and to prevent future ones.

A requester may also demonstrate compelling need by a showing that the information sought is "urgently needed" and involves a "breaking new story of general public interest." 32 C.R.F. § 286.4(d)(3)(iii). The instant Request clearly meets these standards in light of the current public scrutiny and impending legislative hearings in response to the disclosure of the Executive's policies and practices involving warrantless electronic surveillance of persons within the United States. *See, e.g.*, Jennifer Loven, *Report of NS Spying Prompts Call for Probe*, San Fran. Chron., Dec. 16, 2005 (stating that Senator Arlen Specter, chairman of the Senate Judiciary Committee, promised that the Senate would conduct hearings to investigate the NSA's warrantless electronic surveillance practices); *see also* Christine Hauser, *Bush Declines to Discuss Report on Eavesdropping*, N.Y. Times, Dec. 16, 2005; Maura Reynolds & Greg Miller, *Congress Wants Answers About Spying on U.S. Citizens*, Pitts. Post-Gazette, Dec. 16, 2005; James Risen & Eric Lichtblau, *Bush Lets US. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005; Steven Thomma, *Spying Could Create Backlash on Congress; Public Reaction Hinges on Identity of Targets*, San Jose Mercury News, Dec. 16, 2005; Caren Bohan & Thomas Ferraro, *Bush Defends Eavesdropping and Patriot Act*, ABC News, Dec. 17, 2005; Dan Eggen & Charles Lane, *On Hill, Anger and Calls for Hearing Greet News of Stateside Surveillance*, Wash. Post, Dec. 17, 2005; Jennifer Loven, *Bush Defends Secret Spying in U.S.*, San Fran. Chron., Dec. 17, 2005; John Diamond, *NSA's Surveillance of Citizens Echoes 1970s Controversy*, USA Today, Dec. 18, 2005; Barton Gellman & Dafna Linzer, *Pushing the Limits of Wartime Powers*, Wash. Post, Dec. 18, 2005; James Kuhnhenn, *Bush Defends Spying in U.S.*, San Jose Mercury News, Dec. 18, 2005; Fred Barbash & Peter Baker, *Gonzales Defends Eavesdropping Program*, Wash. Post, Dec. 19, 2005; James Gerstenzang, *Bush Vows to Continue Domestic Surveillance*, L.A. Times, Dec. 19, 2005;Todd J. Gillman, *Bush Assails Disclosure of Domestic Spying Program*, San Jose Mercury News, Dec. 19, 2005; Terrence Hunt, *Bush Says NSA Surveillance Necessary, Legal*, Wash. Post, Dec. 19, 2005; David Stout, *Bush Says U.S. Spy Program is Legal and Essential*, N.Y. Times, Dec. 19, 2005; George E. Condon, *Bush Says Spying Is Needed to Guard US*, San Diego Union Trib., Dec. 20, 2005; Michael Kranish, *Bush Calls Leak of Spy Program Shameful*, Bost. Globe, Dec. 20, 2005; Jeff Zeleny, *No 'Unchecked Power' in Domestic Spy Furor*, Chi. Trib., Dec. 20, 2005; Douglas Birch, *NSA's Methods Spur Controversy*, Balt. Sun, Jan. 8, 2006; Dan Eggen, *Probe Set in NSA Bugging*, Wash. Post, Jan. 11, 2006; David E. Sanger, *In Shift, Bush Says He Welcomes Inquiry on Secret Wiretaps*, N.Y. Times, Jan. 11, 2006; Scott Shane, *N.S.A. Audit of Spying is Not Assessing Legality*, N.Y. Times, Jan. 11, 2006; Jessica Yellin, *Ex-CIA Lawyer: No Legal Basis for NSA Spying*, ABC News, Jan. 11, 2006; James Gerstenzang, *Bush Now Cites Value of Spying Inquiry*, L.A. Times, Jan. 12, 2006; Sean Sullivan, *Markey Bashes Surveillance Program at Forum*, Arlington (MA) Advocate, Jan. 12, 2006.

Finally, pursuant to the applicable regulations and statue, CCR and the other Requesters expect the NSA's determination of this Request for expedited processing within 10 calendar days and the determination of this Request for documents within 20 days. *See* 32 C.F.R. § 286.4(d)(1), (3); 5 U.S.C. § 552(a)(6)(A)(i).

5. Requesting Parties Are Entitled To A Fee Waiver

Requesting Parties are entitled to waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because "disclosure of the requested records is in the public interest" and "likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." As indicated above, the significant media attention focused on the NSA's policy of warrantless electronic surveillance reflects the extraordinary public interest in the records Requesters seek. Disclosure of the requested information would reveal the extent of the NSA's warrantless electronic surveillance and/or warrantless physical searches of persons located within the United States, raising weighty constitutional questions.

Further, disclosure of the requested records will aid the public's understanding of the President's decision to disregard existing restraints on the exercise of Executive power, including the minimal oversight provided by the Foreign Intelligence Surveillance Act courts.

Finally, as a non-profit legal, advocacy, and educational organization, CCR and its staff, Board, and volunteer, co-counsel and cooperating attorneys are well-suited to disseminate publicly the information obtained from this Request. Because this Request satisfies the statutory criteria, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be liberally construed in favor of wavers for noncommercial requesters." (internal quotation marks omitted)).

If the fee waiver is not granted, however, we request that the fees assigned be limited to "reasonable standard charges for document duplication" pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . .a representative of the news media . . ." and 32 C.F.R. § 286.28(e) (stating that search and review fees shall not be charges to "representatives of the news media"). If appropriate after reviewing the results of the Request, CCR intends to "disseminate the information" disclosed by this Request "among the public" through the media channels described above. CCR meets the definition of a "representative of the news media" because it is "an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw material into a distinct work, and distributes that work to an audience." *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *see also Judicial Watch Inc., v. Rossotti*, 326 F.3d 1309, 1310 (D.C. 2003) (finding that a non-profit, public interest organization that distributed a newsletter and published books was a "representative of the media" for purposes of FOIA). Accordingly, any fees imposed for the processing of this Request should be limited pursuant to these regulations.

* * * *

If this Request is denied in whole or in part, Requesters ask that the NSA justify all deletions by reference to specific exemptions of FOIA. Requesters expect the NSA to release all segregable portions of otherwise exempt material, and reserve the right to appeal a decision to withhold any records or to deny the within application for expedited processing and waiver of fees.

Thank you for your consideration of this Request. Kindly direct all future responses and furnish all disclosed records to William Goodman, Legal Director, Center for Constitutional Rights, 666 Broadway, 7th floor, New York, N.Y. 10012, telephone (212) 614-6427.

Under penalty of perjury, I hereby affirm that the information provided supporting the Request and the attached Appendix are true and correct to the best of my knowledge and belief.

Signed by:

____

William Goodman, Esq.
Legal Director
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 617-6427

EXHIBIT 4

President Bush, *Radio Address* (Dec. 17, 2005)

For Immediate Release
Office of the Press Secretary
December 17, 2005

President's Radio Address

The Roosevelt Room

10:06 A.M. EST

THE PRESIDENT: Good morning.

As President, I took an oath to defend the Constitution, and I have no greater responsibility than to protect our people, our freedom, and our way of life. On September the 11th, 2001, our freedom and way of life came under attack by brutal enemies who killed nearly 3,000 innocent Americans. We're fighting these enemies across the world. Yet in this first war of the 21st century, one of the most critical battlefronts is the home front. And since September the 11th, we've been on the offensive against the terrorists plotting within our borders.

One of the first actions we took to protect America after our nation was attacked was to ask Congress to pass the Patriot Act. The Patriot Act tore down the legal and bureaucratic wall that kept law enforcement and intelligence authorities from sharing vital information about terrorist threats. And the Patriot Act allowed federal investigators to pursue terrorists with tools they already used against other criminals. Congress passed this law with a large, bipartisan majority, including a vote of 98-1 in the United States Senate.

Since then, America's law enforcement personnel have used this critical law to prosecute terrorist operatives and supporters, and to break up terrorist cells in New York, Oregon, Virginia, California, Texas and Ohio. The Patriot Act has accomplished exactly what it was designed to do: it has protected American liberty and saved American lives.

Yet key provisions of this law are set to expire in two weeks. The terrorist threat to our country will not expire in two weeks. The terrorists want to attack America again, and inflict even greater damage than they did on September the 11th. Congress has a responsibility to ensure that law enforcement and intelligence officials have the tools they need to protect the American people.

The House of Representatives passed reauthorization of the Patriot Act. Yet a minority of senators filibustered to block the renewal of the Patriot Act when it came up for a vote yesterday. That decision is irresponsible, and it endangers the lives of our citizens. The senators who are filibustering must stop their delaying tactics, and the Senate must vote to reauthorize the Patriot Act. In the war on terror, we cannot afford to be without this law for a single moment.

To fight the war on terror, I am using authority vested in me by Congress, including the Joint Authorization for Use of Military Force, which passed overwhelmingly in the first week after September the 11th. I'm also using constitutional authority vested in me as Commander-in-Chief.

In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.

As the 9/11 Commission pointed out, it was clear that terrorists inside the United States were communicating with terrorists abroad before the September the 11th attacks, and the commission criticized our nation's inability to uncover links between terrorists here at home and terrorists abroad. Two of the terrorist hijackers who flew a jet into the Pentagon, Nawaf al Hamzi and Khalid al Mihdhar, communicated while they were in the United States to other members of al Qaeda who were overseas. But we didn't know they were here, until it was too late.

The authorization I gave the National Security Agency after September the 11th helped address that problem in a way that is fully consistent with my constitutional responsibilities and authorities. The activities I have authorized make it more likely that killers like these 9/11 hijackers will be identified and located in time. And the activities conducted under this authorization have helped detect and prevent possible terrorist attacks in the United States and abroad.

The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our nation faces a continuing threat from al Qaeda and related groups.

The NSA's activities under this authorization are thoroughly reviewed by the Justice Department and NSA's top legal officials, including NSA's general counsel and inspector general. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.

This authorization is a vital tool in our war against the terrorists. It is critical to saving American lives. The American people expect me to do everything in my power under our laws and Constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States.

Thank you.

END 10:13 A.M. EST

Return to this article at:
http://www.whitehouse.gov/news/releases/2005/12/20051217.html

EXHIBIT 5

Press Conference of President Bush (Dec. 19, 2005)

Press Conference of the President

The East Room

10:32 A.M. EST

THE PRESIDENT: Welcome. Please be seated. Thanks.

Last night I addressed the nation about our strategy for victory in Iraq, and the historic elections that took place in the country last week. In a nation that once lived by the whims of a brutal dictator, the Iraqi people now enjoy constitutionally protected freedoms, and their leaders now derive their powers from the consent of the government. Millions of Iraqis are looking forward to a future with hope and optimism.

The Iraqi people still face many challenges. This is the first time the Iraqis are forming a government under their new constitution. The Iraqi constitution requires a two-thirds vote of the parliament for certain top officials. So the formation of the new government will take time as Iraqis work to build consensus. And once the new Iraqi government assumes office, Iraq's new leaders will face many important decisions on issues such as security and reconstruction, economic reform and national unity. The work ahead will require the patience of the Iraqi people and the patience and support of America and our coalition partners.

As I said last night, this election does not mean the end of violence, but it is the beginning of something new: a constitutional democracy at the heart of the Middle East. And we will keep working toward our goal of a democratic Iraq that can govern and self-sustain itself and defend itself.

Our mission in Iraq is critical in the victory in the global war on terror. After our country was attacked on September the 11th and nearly 3,000 lives were lost, I vowed to do everything within my power to bring justice to those who were responsible. I also pledged to the American people to do everything within my power to prevent this from happening again. What we quickly learned was that al Qaeda was not a conventional enemy. Some lived in our cities and communities, and communicated from here in America to plot and plan with bin Laden's lieutenants in Afghanistan, Pakistan and elsewhere. Then they boarded our airplanes and launched the worst attack on our country in our nation's history.

This new threat required us to think and act differently. And as the 9/11 Commission pointed out, to prevent this from happening again, we need to connect the dots before the enemy attacks, not after. And we need to recognize that dealing with al Qaeda is not simply a matter of law enforcement; it requires defending the country against an enemy that declared war against the United States of America.

As President and Commander-in-Chief, I have the constitutional responsibility and the constitutional authority to protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it. And after September the 11th, the United States Congress also granted me additional authority to use military force against al Qaeda.

After September the 11th, one question my administration had to answer was how, using the authorities I have, how do we effectively detect enemies hiding in our midst and prevent them from striking us again? We know that a two-minute phone conversation between somebody linked to al Qaeda here and an operative overseas could lead directly to the loss of thousands of lives. To save American lives, we must be able to act fast and to detect these conversations so we can prevent new attacks.

So, consistent with U.S. law and the Constitution, I authorized the interception of international communications of people with known links to al Qaeda and related terrorist organizations. This program is carefully reviewed approximately every 45 days to ensure it is being used properly. Leaders in the United States Congress have been briefed more than a dozen times on this program. And it has been effective in disrupting the enemy, while safeguarding our civil liberties.

This program has targeted those with known links to al Qaeda. I've reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for so long as our nation is -- for so long as the nation faces the continuing threat of an enemy that wants to kill American citizens.

Another vital tool in the war on terror is the Patriot Act. After September the 11th, Congress acted quickly and responsibly by passing this law, which provides our law enforcement and intelligence community key tools to prevent attacks in our country. The Patriot Act tore down the legal and bureaucratic wall that kept law enforcement and intelligence authorities from sharing vital information about terrorist threats. It allows federal investigators to pursue terrorists with tools already used against other types of criminals. America's law enforcement personnel have used this critical tool to prosecute terrorist operatives and their supporters, and to breakup cells here in America.

Yet, key provisions of this law are set to expire in 12 days. The House of Representatives voted for reauthorization, but last week, a minority of senators filibustered the Patriot Act, blocking the Senate from voting to reauthorize key provisions of this vital law. In fact, the Senate Democratic leader boasted to a group of political supporters that the Senate Democrats had "killed the Patriot Act." Most of the senators now filibustering the Patriot Act actually voted for it in 2001. These senators need to explain why they thought the Patriot Act was a vital tool after the September the 11th attacks, but now think it's no longer necessary.

The terrorists want to strike America again, and they hope to inflict even greater damage than they did on September the 11th. Congress has a responsibility to give our law enforcement and intelligence officials the tools they need to protect the American people. The senators who are filibustering the Patriot Act must stop their delaying tactics, and the Senate must vote to reauthorize the Patriot Act. In the war on terror, we cannot afford to be without this law for a single moment.

As we fight the war on terror, we'll also continue to work to build prosperity for our citizens. Because we cut taxes and restrained non-security spending, our economy is strong and it is getting stronger. We added 215,000 new jobs in November. We've added nearly 4.5 million new jobs since May of 2003. The unemployment rate is down to 5 percent, lower than the average of the 1970s, 1980s and 1990s. Despite hurricanes and high gas prices, third quarter growth was 4.3 percent. More Americans own their own homes than at any time in our history. Inflation is low, productivity is high and consumer confidence is up. We're heading into a new year with an economy that is the envy of the world, and we have every reason to be optimistic about our economic future.

We made other important progress this year on the priorities of American families. We passed a good energy bill, and we're putting America on the path to make our economy less dependent on foreign sources of oil. We were wise with taxpayer's money and cut non-security discretionary spending below last year's level. We passed the Central American Dominican Republic Free Trade Agreement to open up markets and help level the playing field for America's workers and farmers and small businesses. We passed bankruptcy reform and class action lawsuit reform. I appointed John Roberts as the 17th Chief Justice of the United States. Chief Justice Roberts is poised to lead the Supreme Court with integrity and prudence for decades to come.

We've got more work to do in this coming year. To keep our economy growing, we need to keep taxes low, and make the tax relief permanent. We must restrain government spending, and I'm pleased that the House today has voted to rein in entitlement spending by $40 billion, and I urge the United States Senate to join them. We must reduce junk lawsuits and strengthen our education system and give more Americans the ability to obtain affordable health insurance. We must pass comprehensive immigration reform that protects our borders, strengthens enforcement and creates a new temporary worker program that relieves pressure on the border, but rejects amnesty.

I look forward to the Senate holding an up or down vote on Judge Sam Alito and confirming him by January 20th as Associate Justice of the Supreme Court. Judge Alito has more prior judicial experience than any Supreme Court nominee in more than 70 years. He's a highly respected and principled jurist and he will make our nation proud as a member of the high court.

As we prepare to spend time with our families this holiday season, we also stop to count our blessings. We're thankful for our courageous men and women in uniform who are spending the holidays away from loved ones, standing watch for liberty in distant lands. We give thanks for our military families who love and support them in their vital work, and who also serve our country. And we pray for the families of the fallen heroes. We hold them in our hearts and we lift them up in our prayers and we pledge that the sacrifice of their loved ones will never be forgotten.

I'll be glad to answer some questions here, starting with you, Terry.

Q Mr. President, thank you, sir. Are you going to order a leaks investigation into the disclosure of the NSA surveillance program? And why did you skip the basic safeguard of asking courts for permission for these intercepts?

THE PRESIDENT: Let me start with the first question. There is a process that goes on inside the Justice Department about leaks, and I presume that process is moving forward. My personal opinion is it was a shameful act for someone to disclose this very important program in a time of war. The fact that we're discussing this program is helping the enemy.

You've got to understand -- and I hope the American people understand -- there is still an enemy that would like to strike the United States of America, and they're very dangerous. And the discussion about how we try to find them will enable them to adjust. Now, I can understand you asking these questions and if I were you, I'd be asking me these questions, too. But it is a shameful act by somebody who has got secrets of the United States government and feels like they need to disclose them publicly.

Let me give you an example about my concerns about letting the enemy know what may or may not be happening. In the late 1990s, our government was following Osama bin Laden because he was using a certain type of telephone. And then the fact that we were following Osama bin Laden because he was using a certain type of telephone made it into the press as the result of a leak. And guess what happened? Saddam -- Osama bin Laden changed his behavior. He began to change how he communicated.

We're at war, and we must protect America's secrets. And so the Justice Department, I presume, will proceed forward with a full investigation. I haven't ordered one, because I understand there's kind of a natural progression that will take place when this kind of leak emerges.

The second part of the question is? Sorry -- I gave a long answer.

Q It was, why did you skip the basic safeguards of asking courts for permission for the intercepts?

THE PRESIDENT: First of all, I -- right after September the 11th, I knew we were fighting a different kind of war. And so I asked people in my administration to analyze how best for me and our government to do the job people expect us to do, which is to detect and prevent a possible attack. That's what the American people want. We looked at the possible scenarios. And the people responsible for helping us protect and defend came forth with the current program, because it enables us to move faster and quicker. And that's important. We've got to be fast on our feet, quick to detect and prevent.

We use FISA still -- you're referring to the FISA court in your question -- of course, we use FISAs. But FISA is for long-term monitoring. What is needed in order to protect the American people is the ability to move quickly to detect.

Now, having suggested this idea, I then, obviously, went to the question, is it legal to do so? I am -- I swore to uphold the laws. Do I have the legal authority to do this? And the answer is, absolutely. As I mentioned in my remarks, the legal authority is derived from the Constitution, as well as the authorization of force by the United States Congress.

Adam.

Q Mr. President, you have hailed the Iraqi elections as a success, but some lawmakers say you are not focusing on the threat of civil war. Do you fear a civil war? And how hard will you push Iraq's competing political parties to get a government and a constitutional compromise?

THE PRESIDENT: I appreciate that. We look at all contingencies, but my optimism about a unified Iraq moving forward was confirmed when over 10 million people went to the polls under a -- and voted for a government under a new constitution. Constitutions tend to bind societies.

Now, there are some things we've got to watch, Adam, for certain. One, is we've got to help the Iraqi government as best as they need help, to stand up a government as quickly as possible. In other words, we're urging them: don't delay, move as quickly as you can, solve the -- get the political parties -- once the vote is completed, get the political parties together and come up with a government.

And it's going to take a while, because, first of all, the ballots won't be fully counted, I guess, until early January. And then, as I mentioned in my remarks, it take a two-thirds vote to -- first, to seat certain officials. Sometimes it's hard to achieve a two-thirds vote in legislative bodies. How about the Senate, for example? (Laughter.) But, nevertheless, it's going to take a while. And the American people have got to understand that we think in terms of elections, most of our elections end the day after the election. Sometimes they don't, Adam. (Laughter.) And so you're going to see a lot of give-and-take, and it's important for us to get this process moving forward.

Secondly, there is an opportunity to amend the constitution. You remember that was part of the deal with the Iraqis, in order to get this process moving. And we'll want to make sure we're monitoring and involved with that part. In other words, involvement doesn't mean telling the sovereign government what to do; involvement means giving advice as to how to move forward so a country becomes more unified. And I'm very optimistic about the way forward for the Iraqi people.

And the reason why is based upon the fact that the Iraqis have shown incredible courage. Think about what has happened in a brief period of time -- relatively brief. I know with all the TV stations and stuff in America, two-and-a-half years seems like an eternity. But in the march of history, it's not all that long. They have gone from tyranny to an amazing election last December. If I'd have stood up here a year ago, in one of my many press conferences, and told you that in the -- next year I make this prediction to you, that over 10 million Iraqis, including many Sunnis, will vote for a permanent government, I think you probably would have said, there he goes again.

But it happened. And it happened because the Iraqis want to live in a free society. And what's important about this election is that Iraq will become an ally in the war on terror, and Iraq will serve as a beacon for what is possible; a beacon of freedom in a part of the world that is desperate for freedom and liberty. And as I say in my speeches, a free Iraq will serve as such an optimistic and hopeful example for reformers from Tehran to Damascus. And that's an important part of a strategy to help lay the foundation of peace for generations.

John.

Q Thank you, Mr. President. So many questions, so little time.

THE PRESIDENT: Well, keep your question short, then. (Laughter.)

Q I'll do my best, sir. But, sir, you've shown a remarkable spirit of candor in the last couple of weeks in your conversation and speeches about Iraq. And I'm wondering if, in that spirit, I might ask you a question that you didn't seem to have an answer for the last time you were asked, and that is, what would you say is the biggest mistake you've made during your presidency, and what have you learned from it?

THE PRESIDENT: Answering Dickerson's question. No, I -- the last time those questions were asked, I really felt like it was an attempt for me to say it was a mistake to go into Iraq. And it wasn't a mistake to go into Iraq. It was the right decision to make.

I think that, John, there's going to be a lot of analysis done on the decisions on the ground in Iraq. For example, I'm fully aware that some have said it was a mistake not to put enough troops there immediately -- or more troops. I made my decision based upon the recommendations of Tommy Franks, and I still think it was the right decision to make. But history will judge.

I said the other day that a mistake was trying to train a civilian defense force and an Iraqi army at the same time, but not giving the civilian defense force enough training and tools necessary to be able to battle a group of thugs and killers. And so we adjusted.

And the point I'm trying to make to the American people in this, as you said, candid dialogue -- I hope I've been candid all along; but in the candid dialogue -- is to say, we're constantly changing our tactics to meet the changing tactics of an enemy. And that's important for our citizens to understand.

Thank you. Kelly.

Q Thank you, Mr. President. If you believe that present law needs to be faster, more agile concerning the surveillance of conversations from someone in the United States to someone outside the country --

THE PRESIDENT: Right.

Q -- why, in the four years since 9/11, has your administration not sought to get changes in the law instead of bypassing it, as some of your critics have said?

THE PRESIDENT: I appreciate that. First, I want to make clear to the people listening that this program is limited in nature to those that are known al Qaeda ties and/or affiliates. That's important. So it's a program that's limited, and you brought up something that I want to stress, and that is, is that these calls are not intercepted within the country. They are from outside the country to in the country, or vice versa. So in other words, this is not a -- if you're calling from Houston to L.A., that call is not monitored. And if there was ever any need to monitor, there would be a process to do that.

I think I've got the authority to move forward, Kelly. I mean, this is what -- and the Attorney General was out briefing this morning about why it's legal to make the decisions I'm making. I can fully understand why members of Congress are expressing concerns about civil liberties. I know that. And it's -- I share the same concerns. I want to make sure the American people understand, however, that we have an obligation to protect you, and we're doing that and, at the same time, protecting your civil liberties.

Secondly, an open debate about law would say to the enemy, here is what we're going to do. And this is an enemy which adjusts. We monitor this program carefully. We have consulted with members of the Congress over a dozen times. We are constantly reviewing the program. Those of us who review the program have a duty to uphold the laws of the United States, and we take that duty very seriously.

Let's see here -- Martha. Working my way around the electronic media, here.

Q Thank you, Mr. President. You say you have an obligation to protect us. Then why not monitor those calls between Houston and L.A.? If the threat is so great, and you use the same logic, why not monitor those calls? Americans thought they weren't being spied on in calls overseas -- why not within the country, if the threat is so great?

THE PRESIDENT: We will, under current law, if we have to. We will monitor those calls. And that's why there is a FISA law. We will apply for the right to do so. And there's a difference -- let me finish -- there is a difference between detecting so we can prevent, and monitoring. And it's important to know the distinction between the two.

Q But preventing is one thing, and you said the FISA laws essentially don't work because of the speed in monitoring calls overseas.

THE PRESIDENT: I said we use the FISA courts to monitor calls. It's a very important tool, and we do use it. I just want to make sure we've got all tools at our disposal. This is an enemy which is quick and it's lethal. And sometimes we have to move very, very quickly. But if there is a need, based upon evidence, we will take that evidence to a court, in order to be able to monitor calls within the United States.

Who haven't I called on, let's see here. Suzanne.

Q Democrats have said that you have acted beyond law, and that you have even broken the law. There are some Republicans who are calling for congressional hearings and even an independent investigation. Are you willing to go before members of Congress and explain this eavesdropping program? And do you support an independent investigation?

THE PRESIDENT: We have been talking to members of the United States Congress. We have met with them over 12 times. And it's important for them to be brought into this process. Again, I repeat, I understand people's concerns. But I also want to assure the American people that I am doing what you expect me to do, which is to safeguard civil liberties and at the same time protect the United States of America. And we've explained the authorities under which I'm making our decisions, and will continue to do so.

Secondly, there is a committee -- two committees on the Hill which are responsible, and that's the Intelligence Committee. Again, any public hearings on programs will say to the enemy, here's what they do; adjust. This is a war. Of course we consult with Congress and have been consulting with Congress and will continue to do so.

Wendell. You got a little problem there, Wendell? (Laughter.)

Q I'm caught, Mr. President.

THE PRESIDENT: Oh, you're caught. (Laughter.) Liberate him. (Laughter.)

Q You talked about your decision to go to war and the bad intelligence, and you've carefully separated the intelligence from the decision, saying that it was the right decision to go to war despite the problems with the intelligence, sir. But, with respect, the intelligence helped you build public support for the war. And so I wonder if now, as you look back, if you look at that intelligence and feel that the intelligence and your use of it might bear some responsibility for the current divisions in the country over the war, and what can you do about it?

THE PRESIDENT: I appreciate that. First of all, I can understand why people were -- well, wait a minute. Everybody thought there was weapons of mass destruction, and there weren't any. I felt the same way. We looked at the intelligence and felt certain that Saddam Hussein had weapons of mass destruction.

Intelligence agencies around the world felt the same way, by the way. Members of the United States Congress looked at the National Intelligence Estimate -- same intelligence estimate I looked at -- and came to the same conclusion, Wendell.

So in other words, there was universal -- there was a universal feeling that he had weapons of mass destruction. As a matter of fact, it was so universal that the United Nations Security Council passed numerous resolutions. And so when the weapons weren't there, like many Americans, I was concerned and wondered why. That's why we set up the Silberman-Robb Commission to address intelligence shortfalls, to hopefully see to it that this kind of situation didn't arise.

Now, having said all that, what we did find after the war was that Saddam Hussein had the desire to -- or the liberation -- Saddam had the desire to reconstitute his weapons programs. In other words, he had the capacity to reconstitute them. America was still his enemy. And of course, he manipulated the oil-for-food program in the hopes of ending sanctions. In our view, he was just waiting for the world to turn its head, to look away, in order to reconstitute the programs. He was dangerous then. It's the right decision to have removed Saddam.

Now, the American people -- I will continue to speak to the American people on this issue, to not only describe the decision-making process but also the way forward. I gave a speech prior to the liberation of Iraq, when I talked about a broader strategic objective, which is the establishment of democracy. And I've talked about democracy in Iraq. Certainly it's not the only rationale; I'm not claiming that. But I also want you to review that speech so that you get a sense for not only the desire to remove a threat, but also the desire to help establish democracy. And the amazing thing about -- in Iraq, as a part of a broader strategy, to help what I call "lay the foundation of peace," democracies don't war; democracies are peaceful countries.

And what you're seeing now is an historic moment, because I believe democracies will spread. I believe when people get the taste for freedom or see a neighbor with a taste for freedom, they will demand the same thing, because I believe in the universality of freedom. I believe everybody has the desire to be free. I recognize some don't believe that, which basically condemns some to tyranny. I strongly believe that deep in everybody's soul is the desire to live in liberty, and if given a chance, they will choose that path. And it's not easy to do that. The other day, I gave a speech and talked about how our road to our Constitution, which got amended shortly after it was approved, was pretty bumpy. We tried the Articles of Confederation. It didn't work. There was a lot of, kind of, civil unrest. But, nevertheless, deep in the soul is the desire to live in liberty, people -- make the -- have got the patience and the steadfastness to achieve that objective. And that is what we're seeing in Iraq.

And it's not going to be easy. It's still going to be hard, because we're getting rid of decades of bitterness. If you're a -- you know, you find these secret prisons where people have been tortured, that's unacceptable. And, yet, there are some who still want to have retribution against people who harmed them.

Now, I'll tell you an amazing story -- at least I thought it was amazing. We had people -- first-time voters, or voters in the Iraqi election come in to see me in the Oval. They had just voted that day, and they came in. It was exciting to talk to people. And one person said, how come you're giving Saddam Hussein a trial? I said, first of all, it's your government, not ours. She said, he doesn't deserve a trial; he deserves immediate death for what he did to my people. And it just struck me about how strongly she felt about the need to not have a rule of law, that there needed to be quick retribution, that he didn't deserve it. And I said to her, don't you see that the trial, itself, stands in such contrast to the tyrant that that in itself is a victory for freedom and a defeat for tyranny -- just the trial alone. And it's important that there be rule of law.

My only point to you is there's a lot of work to get rid of the past, yet we're headed in the right direction. And it's an exciting moment in history.

Stretch.

Q Thank you, Mr. President. Getting back to the domestic spying issue for a moment. According to FISA's own records, it's received nearly 19,000 requests for wiretaps or search warrants since 1979, rejected just five of them. It also operates in secret, so security shouldn't be a concern, and it can be applied retroactively. Given such a powerful tool of law enforcement is at your disposal, sir, why did you see fit to sidetrack that process?

THE PRESIDENT: We used the process to monitor. But also, this is a different -- a different era, a different war, Stretch. So what we're -- people are changing phone numbers and phone calls, and they're moving quick. And we've got to be able to detect and prevent. I keep saying that, but this is a -- it requires quick action.

And without revealing the operating details of our program, I just want to assure the American people that, one, I've got the authority to do this; two, it is a necessary part of my job to protect you; and, three, we're guarding your civil liberties. And we're guarding the civil liberties by monitoring the program on a regular basis, by having the folks at NSA, the legal team, as well as the inspector general, monitor the program, and we're briefing Congress. This is a part of our effort to protect the American people. The American people expect us to protect them and protect their civil liberties. I'm going to do that. That's my job, and I'm going to continue doing my job.

Let's see here -- Sanger.

Q Thank you, Mr. President. Following up on Wendell's question about the intelligence failures ahead of Iraq, one of the side effects appears to have been that the United States has lost some credibility with its allies when it goes to them with new intelligence. You, for example, your administration, has been sharing with some of your allies the contents of a laptop computer that was found in Iran concerning their nuclear program. Yet you are still having --

THE PRESIDENT: Is that classified? (Laughter.) No, never mind, Sanger.

Q Yet you are still having some difficulty convincing people that Iran has a nuclear program. Can you tell us whether or not you think one of the side effects of the intelligence failure has been that it has limited your ability to deal with future threats like Iran, like North Korea, or any other future threats concerning terrorists?

THE PRESIDENT: Sanger, I hate to admit it, but that's an excellent question. No question, that the intelligence failure on weapons of mass destruction caused all intelligence services to have to step back and reevaluate the process of gathering and analyzing intelligence -- no doubt about that. And so there's been a lot of work done to work with other intelligence agencies to share information about what went right and what went wrong, as well as to build credibility among all services.

I think, David, where it is going to be most difficult to make the case is in the public arena. People will say, if we're trying to make the case on Iran, well, the intelligence failed in Iraq, therefore, how can we trust the intelligence in Iran? And part of the reason why there needs to be a public message on this is because the first hope and the first step is a diplomatic effort to get the Iranians to comply with the demands of the free world. If they don't, there's -- along the diplomatic path, there's always the United Nations Security Council. But that case of making -- beginning to say to the Iranians, there are consequences for not behaving, requires people to believe that the Iranian nuclear program is, to a certain extent, ongoing. And so we're working hard on that. I mean, it's no question that the credibility of intelligence is necessary for good diplomacy.

Q Do you intend to make that case publicly, too? You haven't yet laid out the evidence on Iran --

THE PRESIDENT: Well, I think that the best place to make the case now is still in the councils of government and convincing the EU3, for example, to continue working the diplomatic angle. Of course, we want this to be solved diplomatically, and we want the Iranians to hear a unified voice. I think people believe that -- I know this: People know that an Iran with the capacity to manufacture a nuclear weapon is not in the world's interest. That's universally accepted. And that should be accepted universally, particularly after what the President recently said about the desire to annihilate, for example, an ally of the United States.

And so the idea of Iran having a nuclear weapon is -- people say, well, we can't let that happen. The next step is to make sure that the world understands that the capacity to enrich uranium for a civilian program would lead to a weapons program. And so therefore we cannot allow the Iranians to have the capacity to enrich. One of the reasons why I proposed working with the Russians, the Russian idea of allowing Iran to have a civilian nuclear power plant industry without enriched material -- in other words, the enriched materials -- without enriching material, the enriching material would come from Russia, in this case, and be picked up by the Russians, was to prevent them from having the capacity to develop a nuclear weapon.

So I think there's universal agreement that we don't want them to have a weapon. And there is agreement that they should not be allowed to learn how to make a weapon. And beyond that, I think that's all I'm going to say.

But, appreciate it. Baker.

Q Thank you, Mr. President. I wonder if you can tell us today, sir, what, if any, limits you believe there are or should be on the powers of a President during a war, at wartime? And if the global war on terror is going to last for decades, as has been forecast, does that mean that we're going to see, therefore, a more or less permanent expansion of the unchecked power of the executive in American society?

THE PRESIDENT: First of all, I disagree with your assertion of "unchecked power."

Q Well --

THE PRESIDENT: Hold on a second, please. There is the check of people being sworn to uphold the law, for starters. There is oversight. We're talking to Congress all the time, and on this program, to suggest there's unchecked power is not listening to what I'm telling you. I'm telling you, we have briefed the United States Congress on this program a dozen times.

This is an awesome responsibility to make decisions on behalf of the American people, and I understand that, Peter. And we'll continue to work with the Congress, as well as people within our own administration, to constantly monitor programs such as the one I described to you, to make sure that we're protecting the civil liberties of the United States. To say "unchecked power" basically is ascribing some kind of dictatorial position to the President, which I strongly reject.

Q What limits do you --

THE PRESIDENT: I just described limits on this particular program, Peter. And that's what's important for the American people to understand. I am doing what you expect me to do, and at the same time, safeguarding the civil liberties of the country.

John.

Q Thank you, sir. Looking ahead to this time next year, what are the top three or top five -- take your pick -- accomplishments that you hope to have achieved? And in particular, what is your best-case scenario for troop levels in Iraq at this time next year?

THE PRESIDENT: This is kind of like -- this is the ultimate benchmark question. You're trying to not only get me to give benchmarks in Iraq, but also benchmarks domestically.

I hope the world is more peaceful. I hope democracy continues to take root around the world. And I hope people are able to find jobs. The job base of this country is expanding, and we need to keep it that way. We want people working. I want New Orleans and Mississippi to be better places. I appreciate very much the progress that Congress is making toward helping a vision of New Orleans rising up and the Gulf Coast of Mississippi being reconstructed. I think we can make good progress down there.

One of the key decisions our administration has made is to make sure that the levees are better than they were before Katrina in New Orleans. That will help -- people will have the confidence necessary to make investments and to take risk and to expand.

I appreciate the Congress, and I'm looking forward to the Senate affirming the U.S. Congress' decisions to fund the education or reimburse states for education. There's some good health care initiatives in the bill. We want to make sure that people don't get booted out of housing. We want to work carefully to make sure people understand that there are benefits or help available for them to find housing. We want to continue to move temporary housing on the Gulf Coast of Mississippi so people can get better -- closer to their neighborhoods, and get their homes rebuilt. We want to start helping Mayor Nagin get temporary housing near New Orleans so as this economy comes back people will be able to find jobs.

I appreciate the fact that the Congress passed the GO Zone tax incentives in order to attract capital into the region. So one of my hopes is, is that people are able to find hope and optimism after the Katrina disaster down there, that people's lives get up and running again, that people see a brighter future. I've got a lot of hopes, and I'm looking forward to working with Congress to get those -- to achieve some big goals.

Joe.

Q (Inaudible.)

THE PRESIDENT: You see, I hope by now you've discovered something about me, that when I say we're not going to have artificial timetables of withdrawal, and/or try to get me out on a limb on what the troop levels will look like -- the answer to your question on troop levels is, it's conditions-based. We have an objective in Iraq, and as we meet those objectives, our commanders on the ground will determine the size of the troop levels.

Nice try. End of your try.

Joe.

Q Mr. President, you said last night that there were only two options in Iraq -- withdraw or victory. And you asked Americans, especially opponents of the war, to reject partisan politics. Do you really expect congressional Democrats to end their partisan warfare and embrace your war strategy? And what can you do about that to make that happen?

THE PRESIDENT: Actually, I said that victory in Iraq is much larger than a person, a President, or a political party. And I've had some good visits with Senate and House Democrats about the way forward. They share the same concerns I share. You know, they want our troops out of Iraq as quickly as possible, but they don't want to do so without achieving a victory. These are good, solid Americans that agree that we must win for the sake of our security. And I'm interested in, Joe, their ideas, and will continue to listen carefully to their ideas.

On the other hand, there are some in this country that believe, strongly believe that we ought to get out now. And I just don't agree with them. It's a wrong strategy, and I'd like to tell you again why. One, it would dishearten the Iraqis. The Iraqis are making a great -- showing great courage to setting up a democracy. And a democracy in Iraq -- I know I've said this, and I'm going to keep saying it because I want the American people to understand -- a democracy in Iraq is vital in the long run to defeating terrorism. And the reason why is, is because democracy is hopeful and optimistic.

Secondly, it sends the wrong signal to our troops. We've got young men and women over their sacrificing. And all of a sudden, because of politics or some focus group or some poll, they stand up and say, we're out of there. I can't think of anything more dispiriting to a kid risking his or her life than to see decisions made based upon politics.

Thirdly, it sends the wrong signal to the enemy. It just says, wait them out; they're soft, they don't have the courage to complete the mission -- all we've got to do is continue to kill and get these images on the TV screens, and the Americans will leave. And all that will do is embolden these people. Now, I recognize there is a debate in the country, and I fully understand that, about the nature of the enemy. I hear people say, because we took action in Iraq, we stirred them up, they're dangerous. No, they were dangerous before we went into Iraq. That's what the American people have got to understand. That's why I took the decision I took on the NSA decision, because I understand how dangerous they are. And they want to hit us again.

Let me say something about the Patriot Act, if you don't mind. It is inexcusable for the United States Senate to let this Patriot Act expire. You know, there's an interesting debate in Washington, and you're part of it, that says, well, they didn't connect the dots prior to September the 11th -- "they" being not only my administration, but previous administrations. And I understand that debate. I'm not being critical of you bringing this issue up and discussing it, but there was a -- you might remember, if you take a step back, people were pretty adamant about hauling people up to testify, and wondering how come the dots weren't connected.

Well, the Patriot Act helps us connect the dots. And now the United States Senate is going to let this bill expire. Not the Senate -- a minority of senators. And I want senators from New York or Los Angeles or Las Vegas to go home and explain why these cities are safer. It is inexcusable to say, on the one hand, connect the dots, and not give us a chance to do so. We've connected the dots, or trying to connect the dots with the NSA program. And, again, I understand the press and members of the United States Congress saying, are you sure you're safeguarding civil liberties. That's a legitimate question, and an important question. And today I hope I'll help answer that. But we're connecting dots as best as we possibly can.

I mentioned in my radio address -- my live TV radio address -- that there was two killers in San Diego making phone calls prior to the September the 11th attacks. Had this program been in place then, it is more likely we would have been able to catch them. But they're making phone calls from the United States, overseas, talking about -- who knows what they're talking about, but they ended up killing -- being a part of the team that killed 3,000 Americans. And so -- I forgot what got me on the subject, but nevertheless I'm going to -- we're doing the right thing.

April.

Q Mr. President, in making the case for domestic spying, could you tell us about the planned attacks on the U.S. that were thwarted through your domestic spying plan? And also, on the issue of race, since you brought up the issue of Katrina, 2005 gave us your defense of yourself on race, and some are still not sold on that. In 2006, what are you giving to the nation on the issue of race, as we're looking to the renewal of the Voting Rights Act in 2007 and things of that nature?

THE PRESIDENT: Yes, thanks. April, the fact that some in America believe that I am not concerned about race troubles me. One of the jobs of the President is to help people reconcile and to move forward and to unite. One of the most hurtful things I can hear is, Bush doesn't care about African Americans, for example. First of all, it's not true. And, secondly, I believe that -- obviously I've got to do a better job of communicating, I guess, to certain folks, because my job is to say to people, we're all equally American, and the American opportunity applies to you just as much as somebody else. And so I will continue to do my best, April, to reach out.

Now, you talked about -- and we have an opportunity, by the way, in New Orleans, for example, to make sure the education system works, to make sure that we promote ownership. I think it is vitally important for ownership to extend to more than just a single community. I think the more African Americans own their own business, the better off America is. I feel strongly that if we can get people to own and manage their own retirement accounts, like personal accounts and Social Security, it makes society a better place. I want people to be able to say, this is my asset. Heretofore, kind of asset accumulation may have been only a part of -- a single -- a part of -- a segmented part of our strategy. We want assets being passed from one generation to the next. I take pride in this statistic, that more African Americans own a home or more minorities own a home now than ever before in our nation's history, not just African Americans; that's positive.

I still want to make sure, though, that people understand that I care about them and that my view of the future, a bright future, pertains to them as much as any other neighborhood.

Now, you mentioned it's the Voting Rights Act. Congress needs to reauthorize it and I'll sign it.

The other question was?

Q Sir --

THE PRESIDENT: You asked a multiple-part question.

Q Yes, I did.

THE PRESIDENT: Thank you for violating the multiple-part question rule.

Q I didn't know there was a law on that. (Laughter.)

THE PRESIDENT: There's not a law. It's an executive order. (Laughter.) In this case, not monitored by the Congress -- (laughter) -- nor is there any administrative oversight. (Laughter.)

Q Well, without breaking any laws, on to -- back on domestic spying. Making the case for that, can you give us some example --

THE PRESIDENT: Oh, I got you. Yes, sorry. No, I'm not going to talk about that, because it would help give the enemy notification and/or, perhaps, signal to them methods and uses and sources. And we're not going to do that, which is -- it's really important for people to understand that the protection of sources and the protections of methods and how we use information to understand the nature of the enemy is secret. And the reason it's secret is because if it's not secret, the enemy knows about it, and if the enemy knows about it, adjusts.

And again, I want to repeat what I said about Osama bin Laden, the man who ordered the attack that killed 3,000 Americans. We were listening to him. He was using a type of cell phone, or a type of phone, and we put it in the newspaper -- somebody put it in the newspaper that this was the type of device he was using to communicate with his team, and he changed. I don't know how I can make the point more clear that any time we give up -- and this is before they attacked us, by the way -- revealing sources, methods, and what we use the information for simply says to the enemy: change.

Now, if you don't think there's an enemy out there, then I can understand why you ought to say, just tell us all you know. I happen to know there's an enemy there. And the enemy wants to attack us. That is why I hope you can feel my passion about the Patriot Act. It is inexcusable to say to the American people, we're going to be tough on terror, but take away the very tools necessary to help fight these people. And by the way, the tools exist still to fight medical fraud, in some cases, or other -- drug dealers. But with the expiration of the Patriot Act, it prevents us from using them to fight the terrorists. Now, that is just unbelievable. And I'm going to continue talking about this issue and reminding the American people about the importance of the Patriot Act and how necessary it is for us in Washington, D.C. to do our job to protect you.

Let's see, who else? Jackson -- Action Jackson. Got him a new job and everything.

Q Thank you, sir. One of the things we've seen this year is the reduction in your approval rating. And I know how you feel about polls, but it appears to be taking something out of your political clout, as evidenced by the Patriot Act vote. What do you attribute your lower polls to, and are you worried that independents are losing confidence in your leadership?

THE PRESIDENT: David, my job is to confront big challenges and lead. And I fully understand everybody is not going to agree with my decisions. But the President's job is to do what he thinks is right, and that's what I'm going to continue to do.

Secondly, if people want to play politics with the Patriot Act, it's -- let me just put it -- it's not in the best interests of the country, David. And yesterday -- or this morning I spoke to the Speaker, who called me. He said, Mr. President, we had a pretty good couple of days; got your budget passed, got the Katrina relief package going forward; we're supporting our troops; we've got the free trade -- we talked about passing CAFTA in the past. I mean, we've done a lot. And it's good for the country, by the way.

So I'm just going to keep doing my job. Maybe you can keep focusing on all these focus groups and polls, and all that business. My job is to lead, keep telling the American people what I believe, work to bring people together to achieve a common objective, stand on principle, and that's the way I'm going to lead. I did so in 2005, and I'm going to do so in 2006.

Thank you all for coming, and happy holidays to you. Appreciate it.

END 11:28 A.M. EST

Return to this article at:
http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html

EXHIBIT 6

Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to congressional leaders, December 22, 2005

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 22, 2005

The Honorable Pat Roberts
Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John D. Rockefeller, IV
Vice Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jane Harman
Ranking Minority Member
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairmen Roberts and Hoekstra, Vice Chairman Rockefeller, and Ranking Member Harman:

As you know, in response to unauthorized disclosures in the media, the President has described certain activities of the National Security Agency ("NSA") that he has authorized since shortly after September 11, 2001. As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. The President has made clear that he will use his constitutional and statutory authorities to protect the American people from further terrorist attacks, and the NSA activities the President described are part of that effort. Leaders of the Congress were briefed on these activities more than a dozen times.

The purpose of this letter is to provide an additional brief summary of the legal authority supporting the NSA activities described by the President.

As an initial matter, I emphasize a few points. The President stated that these activities are "crucial to our national security." The President further explained that "the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country." These critical national security activities remain classified. All United States laws and policies governing the protection and nondisclosure of national security information, including the information relating to the activities described by the President, remain in full force and effect. The unauthorized disclosure of classified information violates federal criminal law. The Government may provide further classified briefings to the Congress on these activities in an appropriate manner. Any such briefings will be conducted in a manner that will not endanger national security.

Under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty. *See, e.g.*, *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (stressing that if the Nation is invaded, "the President is not only authorized but bound to resist by force . . . . without waiting for any special legislative authority"); *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); *id.* at 40 (Tatel, J., concurring). The Congress recognized this constitutional authority in the preamble to the Authorization for the Use of Military Force ("AUMF") of September 18, 2001, 115 Stat. 224 (2001) ("[T]he President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."), and in the War Powers Resolution, *see* 50 U.S.C. § 1541(c) ("The constitutional powers of the President as Commander in Chief to introduce United States Armed Forces into hostilities[] . . . [extend to] a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.").

This constitutional authority includes the authority to order warrantless foreign intelligence surveillance within the United States, as all federal appellate courts, including at least four circuits, to have addressed the issue have concluded. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. of Review 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . We take for granted that the President does have that authority . . . ."). The Supreme Court has said that warrants are generally required in the context of purely *domestic* threats, but it expressly distinguished *foreign* threats. *See United States v. United States District Court*, 407 U.S. 297, 308 (1972). As Justice Byron White recognized almost 40 years ago, Presidents have long exercised the authority to conduct warrantless surveillance for national security purposes, and a warrant is unnecessary "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." *Katz v. United States*, 389 U.S. 347, 363-64 (1967) (White, J., concurring).

The President's constitutional authority to direct the NSA to conduct the activities he described is supplemented by statutory authority under the AUMF. The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States." § 2(a). The AUMF clearly contemplates action within the United States, *see also id.* pmbl. (the attacks of September 11 "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad"). The AUMF cannot be read as limited to authorizing the use of force against Afghanistan, as some have argued. Indeed, those who directly "committed" the attacks of September 11 resided in the United States for months before those attacks. The reality of the September 11 plot demonstrates that the authorization of force covers activities both on foreign soil and in America.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court addressed the scope of the AUMF. At least five Justices concluded that the AUMF authorized the President to detain a U.S. citizen in the United States because "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" and is therefore included in the "necessary and appropriate force" authorized by the Congress. *Id.* at 518-19 (plurality opinion of O'Connor, J.); *see id.* at 587 (Thomas, J., dissenting). These five Justices concluded that the AUMF "clearly and unmistakably authorize[s]" the "fundamental incident[s] of waging war." *Id.* at 518-19 (plurality opinion); *see id.* at 587 (Thomas, J., dissenting).

Communications intelligence targeted at the enemy is a fundamental incident of the use of military force. Indeed, throughout history, signals intelligence has formed a critical part of waging war. In the Civil War, each side tapped the telegraph lines of the other. In the World Wars, the United States intercepted telegrams into and out of the country. The AUMF cannot be read to exclude this long-recognized and essential authority to conduct communications intelligence targeted at the enemy. We cannot fight a war blind. Because communications intelligence activities constitute, to use the language of *Hamdi*, a fundamental incident of waging war, the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy. Accordingly, the President's "authority is at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *cf. Youngstown*, 343 U.S. at 585 (noting the absence of a statute "from which [the asserted authority] c[ould] be fairly implied").

The President's authorization of targeted electronic surveillance by the NSA is also consistent with the Foreign Intelligence Surveillance Act ("FISA"). Section 2511(2)(f) of title 18 provides, as relevant here, that the procedures of FISA and two chapters of title 18 "shall be the exclusive means by which electronic surveillance . . . may be conducted." Section 109 of FISA, in turn, makes it unlawful to conduct electronic surveillance, "except as authorized by statute." 50 U.S.C. § 1809(a)(1). Importantly, section 109's exception for electronic surveillance "authorized by statute" is broad, especially considered in the context of surrounding provisions. *See* 18 U.S.C. § 2511(1) ("Except as otherwise specifically provided *in this chapter* any person who—(a) intentionally intercepts . . . any wire, oral, or electronic communication[] . . . shall be punished . . . .") (emphasis added); *id.* § 2511(2)(e) (providing a defense to liability to individuals "conduct[ing] electronic surveillance, . . . as authorized by *that Act [FISA]*") (emphasis added).

By expressly and broadly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f). The AUMF satisfies section 109's requirement for statutory authorization of electronic surveillance, just as a majority of the Court in *Hamdi* concluded that it satisfies the requirement in 18 U.S.C. § 4001(a) that no U.S. citizen be detained by the United States "except pursuant to an Act of Congress." *See Hamdi*, 542

U.S. at 519 (explaining that "it is of no moment that the AUMF does not use specific language of detention"); *see id.* at 587 (Thomas, J., dissenting).

Some might suggest that FISA could be read to require that a subsequent statutory authorization must come in the form of an amendment to FISA itself. But under established principles of statutory construction, the AUMF and FISA must be construed in harmony to avoid any potential conflict between FISA and the President's Article II authority as Commander in Chief. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *INS v. St. Cyr*, 533 U.S. 289, 300 (2001). Accordingly, any ambiguity as to whether the AUMF is a statute that satisfies the requirements of FISA and allows electronic surveillance in the conflict with al Qaeda without complying with FISA procedures must be resolved in favor of an interpretation that is consistent with the President's long-recognized authority.

The NSA activities described by the President are also consistent with the Fourth Amendment and the protection of civil liberties. The Fourth Amendment's "central requirement is one of reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (internal quotation marks omitted). For searches conducted in the course of ordinary criminal law enforcement, reasonableness generally requires securing a warrant. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002). Outside the ordinary criminal law enforcement context, however, the Supreme Court has, at times, dispensed with the warrant, instead adjudging the reasonableness of a search under the totality of the circumstances. *See United States v. Knights*, 534 U.S. 112, 118 (2001). In particular, the Supreme Court has long recognized that "special needs, beyond the normal need for law enforcement," can justify departure from the usual warrant requirement. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (striking down checkpoint where "primary purpose was to detect evidence of ordinary criminal wrongdoing").

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the "special needs" exception to the warrant requirement. Foreign intelligence collection undertaken to prevent further devastating attacks on our Nation serves the highest government purpose through means other than traditional law enforcement. *See In re Sealed Case*, 310 F.3d at 745; *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (recognizing that the Fourth Amendment implications of foreign intelligence surveillance are far different from ordinary wiretapping, because they are not principally used for criminal prosecution).

Intercepting communications into and out of the United States of persons linked to al Qaeda in order to detect and prevent a catastrophic attack is clearly *reasonable*. Reasonableness is generally determined by "balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests." *Earls*, 536 U.S. at 829. There is undeniably an important and legitimate privacy interest at stake with respect to the activities described by the President. That must be balanced, however, against the Government's compelling interest in the security of the Nation, *see, e.g., Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.") (citation and quotation marks omitted). The fact that the NSA activities are reviewed and reauthorized approximately every 45 days to ensure that they continue to be necessary and appropriate further demonstrates the reasonableness of these activities.

As explained above, the President determined that it was necessary following September 11 to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities. Nevertheless, I want to stress that the United States makes full use of FISA to address the terrorist threat, and FISA has proven to be a very important tool, especially in longer-term investigations. In addition, the United States is constantly assessing all available legal options, taking full advantage of any developments in the law.

We hope this information is helpful.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

EXHIBIT 7

Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005

For Immediate Release
Office of the Press Secretary
December 19, 2005

Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence

James S. Brady Briefing Room

8:30 A.M. EST

MR. McCLELLAN: Good morning, everybody. I've got with me the Attorney General and General Hayden here this morning to brief you on the legal issues surrounding the NSA authorization and take whatever questions you have for them on that. The Attorney General will open with some comments and then they'll be glad to take your questions.

And with that, I'll turn it over to General Gonzales.

ATTORNEY GENERAL GONZALES: Thanks, Scott.

The President confirmed the existence of a highly classified program on Saturday. The program remains highly classified; there are many operational aspects of the program that have still not been disclosed and we want to protect that because those aspects of the program are very, very important to protect the national security of this country. So I'm only going to be talking about the legal underpinnings for what has been disclosed by the President.

The President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the -- one party to the communication is outside the United States. And this is a very important point -- people are running around saying that the United States is somehow spying on American citizens calling their neighbors. Very, very important to understand that one party to the communication has to be outside the United States.

Another very important point to remember is that we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. We view these authorities as authorities to confront the enemy in which the United States is at war with -- and that is al Qaeda and those who are supporting or affiliated with al Qaeda.

What we're trying to do is learn of communications, back and forth, from within the United States to overseas with members of al Qaeda. And that's what this program is about.

Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides -- requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless there is somehow -- there is -- unless otherwise authorized by statute or by Congress. That's what the law requires. Our position is, is that the authorization to use force, which was passed by the Congress in the days following September 11th, constitutes that other authorization, that other statute by Congress, to engage in this kind of signals intelligence.

Now, that -- one might argue, now, wait a minute, there's nothing in the authorization to use force that specifically mentions electronic surveillance. Let me take you back to a case that the Supreme Court reviewed this past -- in 2004, the Hamdi decision. As you remember, in that case, Mr. Hamdi was a U.S. citizen who was contesting his detention by the United States government. What he said was that there is a statute, he said, that specifically prohibits the detention of American citizens without permission, an act by Congress -- and he's right, 18 USC 4001a requires that the United States government cannot detain an American citizen except by an act of Congress.

We took the position -- the United States government took the position that Congress had authorized that detention in the authorization to use force, even though the authorization to use force never mentions the word "detention." And the Supreme Court, a plurality written by Justice O'Connor agreed. She said, it was clear and unmistakable that the Congress had authorized the detention of an American citizen captured on the battlefield as an enemy combatant for the remainder -- the duration of the hostilities. So even though the authorization to use force did not mention the word, "detention," she felt that detention of enemy soldiers captured on the battlefield was a fundamental incident of waging war, and therefore, had been authorized by Congress when they used the words, "authorize the President to use all necessary and appropriate force."

For the same reason, we believe signals intelligence is even more a fundamental incident of war, and we believe has been authorized by the Congress. And even though signals intelligence is not mentioned in the authorization to use force, we believe that the Court would apply the same reasoning to recognize the authorization by Congress to engage in this kind of electronic surveillance.

I might also add that we also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world wars, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do. It is a fundamental incident of war, as Justice O'Connor talked about in the Hamdi decision. We believe that -- and those two authorities exist to allow, permit the United States government to engage in this kind of surveillance.

The President, of course, is very concerned about the protection of civil liberties, and that's why we've got strict parameters, strict guidelines in place out at NSA to ensure that the program is operating in a way that is consistent with the President's directives. And, again, the authorization by the President is only to engage in surveillance of communications where one party is outside the United States, and where we have a reasonable basis to conclude that one of the parties of the communication is either a member of al Qaeda or affiliated with al Qaeda.

Mike, do you want to -- have anything to add?

GENERAL HAYDEN: I'd just add, in terms of what we do globally with regard to signals intelligence, which is a critical part of defending the nation, there are probably no communications more important to what it is we're trying to do to defend the nation; no communication is more important for that purpose than those communications that involve al Qaeda, and one end of which is inside the homeland, one end of which is inside the United States. Our purpose here is to detect and prevent attacks. And the program in this regard has been successful.

Q General, are you able to say how many Americans were caught in this surveillance?

ATTORNEY GENERAL GONZALES: I'm not -- I can't get into the specific numbers because that information remains classified. Again, this is not a situation where -- of domestic spying. To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda.

Q General, can you tell us why you don't choose to go to the FISA court?

ATTORNEY GENERAL GONZALES: Well, we continue to go to the FISA court and obtain orders. It is a very important tool that we continue to utilize. Our position is that we are not legally required to do, in this particular case, because the law requires that we -- FISA requires that we get a court order, unless authorized by a statute, and we believe that authorization has occurred.

The operators out at NSA tell me that we don't have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology --

Q But it's been kind of retroactively, hasn't it?

ATTORNEY GENERAL GONZALES: -- since then. Pardon me?

Q It's been done retroactively before, hasn't it?

ATTORNEY GENERAL GONZALES: What do you mean, "retroactively"?

Q You just go ahead and then you apply for the FISA clearance, because it's damn near automatic.

ATTORNEY GENERAL GONZALES: If we -- but there are standards that have to be met, obviously, and you're right, there is a procedure where we -- an emergency procedure that allows us to make a decision to authorize -- to utilize FISA, and then we go to the court and get confirmation of that authority.

But, again, FISA is very important in the war on terror, but it doesn't provide the speed and the agility that we need in all circumstances to deal with this new kind of threat.

Q But what -- go ahead.

GENERAL HAYDEN: Let me just add to the response to the last question. As the Attorney General says, FISA is very important, we make full use of FISA. But if you picture what FISA was designed to do, FISA is designed to handle the needs in the nation in two broad categories: there's a law enforcement aspect of it; and the other aspect is the continued collection of foreign intelligence. I don't think anyone could claim that FISA was envisaged as a tool to cover armed enemy combatants in preparation for attacks inside the United States. And that's what this authorization under the President is designed to help us do.

Q Have you identified armed enemy combatants, through this program, in the United States?

GENERAL HAYDEN: This program has been successful in detecting and preventing attacks inside the United States.

Q General Hayden, I know you're not going to talk about specifics about that, and you say it's been successful. But would it have been as successful -- can you unequivocally say that something has been stopped or there was an imminent attack or you got information through this that you could not have gotten through going to the court?

GENERAL HAYDEN: I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available.

Q Through the court? Because of the speed that you got it?

GENERAL HAYDEN: Yes, because of the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say unequivocally that we have used this program in lieu of that and this program has been successful.

Q But one of the things that concerns people is the slippery slope. If you said you absolutely need this program, you have to do it quickly -- then if you have someone you suspect being a member of al Qaeda, and they're in the United States, and there is a phone call between two people in the United States, why not use that, then, if it's so important? Why not go that route? Why not go further?

GENERAL HAYDEN: Across the board, there is a judgment that we all have to make -- and I made this speech a day or two after 9/11 to the NSA workforce -- I said, free peoples always have to judge where they want to be on that spectrum between security and liberty; that there will be great pressures on us after those attacks to move our national banner down in the direction of security. What I said to the NSA workforce is, our job is to keep Americans free by making Americans feel safe again. That's been the mission of the National Security Agency since the day after the attack, is when I talked -- two days after the attack is when I said that to the workforce.

There's always a balancing between security and liberty. We understand that this is a more -- I'll use the word "aggressive" program than would be traditionally available under FISA. It is also less intrusive. It deals only with international calls. It is generally for far shorter periods of time. And it is not designed to collect reams of intelligence, but to detect and warn and prevent about attacks. And, therefore, that's where we've decided to draw that balance between security and liberty.

Q Gentlemen, can you say when Congress was first briefed, who was included in that, and will there be a leaks investigation?

ATTORNEY GENERAL GONZALES: Well of course, we're not going to -- we don't talk about -- we try not to talk about investigations. As to whether or not there will be a leak investigation, as the President indicated, this is really hurting national security, this has really hurt our country, and we are concerned that a very valuable tool has been compromised. As to whether or not there will be a leak investigation, we'll just have to wait and see.

And your first question was?

Q When was Congress first briefed --

ATTORNEY GENERAL GONZALES: I'm not going to -- I'm not going to talk about -- I'll let others talk about when Congress was first briefed. What I can say is, as the President indicated on Saturday, there have been numerous briefings with certain key members of Congress. Obviously, some members have come out since the revelations on Saturday, saying that they hadn't been briefed. This is a very classified program. It is probably the most classified program that exists in the United States government, because the tools are so valuable, and therefore, decisions were made to brief only key members of Congress. We have begun the process now of reaching out to other members of Congress. I met last night, for example, with Chairman Specter and other members of Congress to talk about the legal aspects of this program.

And so we are engaged in a dialogue now to talk with Congress, but also -- but we're still mindful of the fact that still -- this is still a very highly classified program, and there are still limits about what we can say today, even to certain members of Congress.

Q General, what's really compromised by the public knowledge of this program? Don't you assume that the other side thinks we're listening to them? I mean, come on.

GENERAL HAYDEN: The fact that this program has been successful is proof to me that what you claim to be an assumption is certainly not universal. The more we discuss it, the more we put it in the face of those who would do us harm, the more they will respond to this and protect their communications and make it more difficult for us to defend the nation.

Q Mr. Attorney General --

Q -- became public, have you seen any evidence in a change in the tactics or --

ATTORNEY GENERAL GONZALES: We're not going to comment on that kind of operational aspect.

Q You say this has really hurt the American people. Is that based only on your feeling about it, or is there some empirical evidence to back that up, even if you can't --

ATTORNEY GENERAL GONZALES: I think the existence of this program, the confirmation of the -- I mean, the fact that this program exists, in my judgment, has compromised national security, as the President indicated on Saturday.

Q I'd like to ask you, what are the constitutional limits on this power that you see laid out in the statute and in your inherent constitutional war power? And what's to prevent you from just listening to everyone's conversation and trying to find the word "bomb," or something like that?

ATTORNEY GENERAL GONZALES: Well, that's a good question. This was a question that was raised in some of my discussions last night with members of Congress. The President has not authorized -- has not authorized blanket surveillance of communications here in the United States. He's been very clear about the kind of surveillance that we're going to engage in. And that surveillance is tied with our conflict with al Qaeda.

You know, we feel comfortable that this surveillance is consistent with requirements of the 4th Amendment. The touchstone of the 4th Amendment is reasonableness, and the Supreme Court has long held that there are exceptions to the warrant requirement in -- when special needs outside the law enforcement arena. And we think that that standard has been met here. When you're talking about communications involving al Qaeda, when you -- obviously there are significant privacy interests implicated here, but we think that those privacy interests have been addressed; when you think about the fact that this is an authorization that's ongoing, it's not a permanent authorization, it has to be reevaluated from time to time. There are additional safeguards that have been in place -- that have been imposed out at NSA, and we believe that it is a reasonable application of these authorities.

Q Mr. Attorney General, haven't you stretched --

Q -- adequate because of technological advances? Wouldn't you do the country a better service to address that issue and fix it, instead of doing a backdoor approach --

ATTORNEY GENERAL GONZALES: This is not a backdoor approach. We believe Congress has authorized this kind of surveillance. We have had discussions with Congress in the past -- certain members of Congress -- as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.

Q If this is not backdoor, is this at least a judgment call? Can you see why other people would look at it and say, well, no, we don't see it that way?

ATTORNEY GENERAL GONZALES: I think some of the concern is because people had not been briefed; they don't understand the specifics of the program, they don't understand the strict safeguards within the program. And I haven't had a discussion -- an opportunity to have a discussion with them about our legal analysis. So, obviously, we're in that process now. Part of the reason for this press brief today is to have you help us educate the American people and the American Congress about what we're doing and the legal basis for what we're doing.

Q Al, you talk about the successes and the critical intercepts of the program. Have there also been cases in which after listening in or intercepting, you realize you had the wrong guy and you listened to what you shouldn't have?

GENERAL HAYDEN: That's why I mentioned earlier that the program is less intrusive. It deals only with international calls. The time period in which we would conduct our work is much shorter, in general, overall, than it would be under FISA. And one of the true purposes of this is to be very agile, as you described.

If this particular line of logic, this reasoning that took us to this place proves to be inaccurate, we move off of it right away.

Q Are there cases in which --

GENERAL HAYDEN: Yes, of course.

Q Can you give us some idea of percentage, or how often you get it right and how often you get it wrong?

GENERAL HAYDEN: No, it would be very -- no, I cannot, without getting into the operational details. I'm sorry.

Q But there are cases where you wind up listening in where you realize you shouldn't have?

GENERAL HAYDEN: There are cases like we do with regard to the global SIGIN system -- you have reasons to go after particular activities, particular communications. There's a logic; there is a standard as to why you would go after that, not just in a legal sense, which is very powerful, but in a practical sense. We can't waste resources on targets that simply don't provide valuable information. And when we decide that is the case -- and in this program, the standards, in terms of re-evaluating whether or not this coverage is worthwhile at all, are measured in days and weeks.

Q Would someone in a case in which you got it wrong have a cause of action against the government?

ATTORNEY GENERAL GONZALES: That is something I'm not going to answer, Ken.

Q I wanted to ask you a question. Do you think the government has the right to break the law?

ATTORNEY GENERAL GONZALES: Absolutely not. I don't believe anyone is above the law.

Q You have stretched this resolution for war into giving you carte blanche to do anything you want to do.

ATTORNEY GENERAL GONZALES: Well, one might make that same argument in connection with detention of American citizens, which is far more intrusive than listening into a conversation. There may be some members of Congress who might say, we never --

Q That's your interpretation. That isn't Congress' interpretation.

ATTORNEY GENERAL GONZALES: Well, I'm just giving you the analysis --

Q You're never supposed to spy on Americans.

ATTORNEY GENERAL GONZALES: I'm just giving the analysis used by Justice O'Connor -- and she said clearly and unmistakenly the Congress authorized the President of the United States to detain an American citizen, even though the authorization to use force never mentions the word "detention" --

Q -- into wiretapping everybody and listening in on --

ATTORNEY GENERAL GONZALES: This is not about wiretapping everyone. This is a very concentrated, very limited program focused at gaining information about our enemy.

Q Now that the cat is out of the bag, so to speak, do you expect your legal analysis to be tested in the courts?

ATTORNEY GENERAL GONZALES: I'm not going to, you know, try to guess as to what's going to happen about that. We're going to continue to try to educate the American people and the American Congress about what we're doing and the basis -- why we believe that the President has the authority to engage in this kind of conduct.

Q Because there are some very smart legal minds who clearly think a law has been broken here.

ATTORNEY GENERAL GONZALES: Well, I think that they may be making or offering up those opinions or assumptions based on very limited information. They don't have all the information about the program. I think they probably don't have the information about our legal analysis.

Q Judge Gonzales, will you release then, for the reasons you're saying now, the declassified versions of the legal rationale for this from OLC? And if not, why not? To assure the American public that this was done with the legal authority that you state.

ATTORNEY GENERAL GONZALES: We're engaged now in a process of educating the American people, again, and educating the Congress. We'll make the appropriate evaluation at the appropriate time as to whether or not additional information needs to be provided to the Congress or the American people.

Q You declassified OLC opinions before, after the torture -- why not do that here to show, yes, we went through a process?

ATTORNEY GENERAL GONZALES: I'm not confirming the existence of opinions or the non-existence of opinions. I've offered up today our legal analysis of the authorities of this President.

Q Sir, can you explain, please, the specific inadequacies in FISA that have prevented you from sort of going through the normal channels?

GENERAL HAYDEN: One, the whole key here is agility. And let me re-trace some grounds I tried to suggest earlier. FISA was built for persistence. FISA was built for long-term coverage against known agents of an enemy power. And the purpose involved in each of those -- in those cases was either for a long-term law enforcement purpose or a long-term intelligence purpose.

This program isn't for that. This is to detect and prevent. And here the key is not so much persistence as it is agility. It's a quicker trigger. It's a subtly softer trigger. And the intrusion into privacy -- the intrusion into privacy is significantly less. It's only international calls. The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order. And our purpose here, our sole purpose is to detect and prevent.

Again, I make the point, what we are talking about here are communications we have every reason to believe are al Qaeda communications, one end of which is in the United States. And I don't think any of us would want any inefficiencies in our coverage of those kinds of communications, above all. And that's what this program allows us to do -- it allows us to be as agile as operationally required to cover these targets.

Q But how does FISA --

GENERAL HAYDEN: FISA involves the process -- FISA involves marshaling arguments; FISA involves looping paperwork around, even in the case of emergency authorizations from the Attorney General. And beyond that, it's a little -- it's difficult for me to get into further discussions as to why this is more optimized under this process without, frankly, revealing too much about what it is we do and why and how we do it.

Q If FISA didn't work, why didn't you seek a new statute that allowed something like this legally?

ATTORNEY GENERAL GONZALES: That question was asked earlier. We've had discussions with members of Congress, certain members of Congress, about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be -- that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program. And that -- and so a decision was made that because we felt that the authorities were there, that we should continue moving forward with this program.

Q And who determined that these targets were al Qaeda? Did you wiretap them?

GENERAL HAYDEN: The judgment is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply -- and it's a two-person standard that must be signed off by a shift supervisor, and carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States.

Q So a shift supervisor is now making decisions that a FISA judge would normally make? I just want to make sure I understand. Is that what you're saying?

GENERAL HAYDEN: What we're trying to do is to use the approach we have used globally against al Qaeda, the operational necessity to cover targets. And the reason I emphasize that this is done at the operational level is to remove any question in your mind that this is in any way politically influenced. This is done to chase those who would do harm to the United States.

Q Building on that, during --

Q Thank you, General. Roughly when did those conversations occur with members of Congress?

ATTORNEY GENERAL GONZALEZ: I'm not going to get into the specifics of when those conversations occurred, but they have occurred.

Q May I just ask you if they were recently or if they were when you began making these exceptions?

ATTORNEY GENERAL GONZALEZ: They weren't recently.

MR. McCLELLAN: The President indicated that those -- the weeks after September 11th.

Q What was the date, though, of the first executive order? Can you give us that?

GENERAL HAYDEN: If I could just, before you ask that question, just add -- these actions that I described taking place at the operational level -- and I believe that a very important point to be made -- have intense oversight by the NSA Inspector General, by the NSA General Counsel, and by officials of the Justice Department who routinely look into this process and verify that the standards set out by the President are being followed.

Q Can you absolutely assure us that all of the communications intercepted --

Q Have you said that you -- (inaudible) -- anything about this program with your international partners -- with the partners probably in the territories of which you intercept those communications?

ATTORNEY GENERAL GONZALEZ: I'm not aware of discussions with other countries, but that doesn't mean that they haven't occurred. I simply have no personal knowledge of that.

Q Also, is it only al Qaeda, or maybe some other terrorist groups?

ATTORNEY GENERAL GONZALEZ: Again, with respect to what the President discussed on Saturday, this program -- it is tied to communications where we believe one of the parties is affiliated with al Qaeda or part of an organization or group that is supportive of al Qaeda.

Q Sir, during his confirmation hearings, it came out that now-Ambassador Bolton had sought and obtained NSA intercepts of conversations between American citizens and others. Who gets the information from this program; how do you guarantee that it doesn't get too widely spread inside the government, and used for other purposes?

Q And is it destroyed afterwards?

GENERAL HAYDEN: We report this information the way we report any other information collected by the National Security Agency. And the phrase you're talking about is called minimization of U.S. identities. The same minimalizationist standards apply across the board, including for this program. To make this very clear -- U.S. identities are minimized in all of NSA's activities, unless, of course, the U.S. identity is essential to understand the inherent intelligence value of the intelligence report. And that's the standard that's used.

Q General, when you discussed the emergency powers, you said, agility is critical here. And in the case of the emergency powers, as I understand it, you can go in, do whatever you need to do, and within 72 hours just report it after the fact. And as you say, these may not even last very long at all. What would be the difficulty in setting up a paperwork system in which the logs that you say you have the shift supervisors record are simply sent to a judge after the fact? If the judge says that this is not legitimate, by that time probably your intercept is over, wouldn't that be correct?

GENERAL HAYDEN: What you're talking about now are efficiencies. What you're asking me is, can we do this program as efficiently using the one avenue provided to us by the FISA Act, as opposed to the avenue provided to us by subsequent legislation and the President's authorization.

Our operational judgment, given the threat to the nation that the difference in the operational efficiencies between those two sets of authorities are such that we can provide greater protection for the nation operating under this authorization.

Q But while you're getting an additional efficiency, you're also operating outside of an existing law. If the law would allow you to stay within the law and be slightly less efficient, would that be --

ATTORNEY GENERAL GONZALEZ: I guess I disagree with that characterization. I think that this electronic surveillance is within the law, has been authorized. I mean, that is our position. We're only required to achieve a court order through FISA if we don't have authorization otherwise by the Congress, and we think that that has occurred in this particular case.

Q Can you just give us one assurance before you go, General?

ATTORNEY GENERAL GONZALEZ: It depends on what it is. (Laughter.)

Q Can you assure us that all of these intercepts had an international component and that at no time were any of the intercepts purely domestic?

GENERAL HAYDEN: The authorization given to NSA by the President requires that one end of these communications has to be outside the United States. I can assure you, by the physics of the intercept, by how we actually conduct our activities, that one end of these communications are always outside the United States of America.

END 9:02 A.M. EST

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EXHIBIT 8

Michael Hayden, *Remarks at the National Press Club on NSA Domestic Surveillance* (Jan. 23, 2006)

REMARKS BY GENERAL MICHAEL V. HAYDEN,
THE DEPUTY DIRECTOR OF NATIONAL INTELLIGENCE AND
FORMER DIRECTOR OF THE NATIONAL SECURITY AGENCY
INTRODUCTION BY KEITH HILL
TOPIC: NATIONAL SECURITY AGENCY'S MONITORING OF
COMMUNICATIONS OF SUSPECTED AL QAEDA TERRORISTS
LOCATION: NATIONAL PRESS CLUB, WASHINGTON, D.C.
TIME: 10:00 A.M. EST
DATE: MONDAY, JANUARY 23, 2006
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THIS IS A RUSH TRANSCRIPT.

MR. HILL: Good morning. My name is Keith Hill. I'm an editor/writer with the Bureau of National Affairs, Press Club governor and vice chair of the club's Newsmaker Committee, and I'll be today's moderator.

Today, we have General Michael Hayden, principal deputy director of National Intelligence with the Office of National Intelligence, who will talk about the recent controversy surrounding the National Security Agency's warrantless monitoring of communications of suspected al Qaeda terrorists.

General Hayden, who's been in this position since last April, is currently the highest ranking military intelligence officer in the armed services, and he also knows a little something about this controversy because in his previous life he was NSA director when the NSA monitoring program began in 2000 -- 2001, sorry.
So with that, I will turn the podium over to General Hayden.

GEN. HAYDEN: Keith, thanks. Good morning. I'm happy to be here to talk a bit about what American intelligence has been doing and especially what NSA has been doing to defend the nation.

Now, as Keith points out, I'm here today not only as Ambassador John Negroponte's deputy in the Office of the Director of National Intelligence, I'm also here as the former director of the National Security Agency, a post I took in March of 1999 and left only last spring.

Serious issues have been raised in recent weeks, and discussion of serious issues should be based on facts. There's a lot of information out there right now.

Some of it is, frankly, inaccurate. Much of it is just simply misunderstood. I'm here to tell the American people what NSA has been doing and why. And perhaps more importantly, what NSA has not been doing.

Now, admittedly, this is a little hard to do while protecting our country's intelligence sources and methods. And, frankly, people in my line of work generally don't like to talk about what they've done until it becomes a subject on the History Channel. But let me make one thing very clear. As challenging as this morning might be, this is the speech I want to give. I much prefer being here with you today telling you about the things we have done when there hasn't been an attack on the homeland. This is a far easier presentation to make than the ones I had to give four years ago telling audiences like you what we hadn't done in the days and months leading up to the tragic events of September 11th.

Today's story isn't an easy one to tell in this kind of unclassified environment, but it is by far the brief I prefer to present.

Now, I know we all have searing memories of the morning of September 11th. I know I do. Making the decision to evacuate non-essential workers at NSA while the situation was unclear; seeing the NSA counterterrorism shop in tears while we were tacking up blackout curtains around their windows; like many of you, making that phone call, asking my wife to find our kids, and then hanging up the phone on her.

Another memory for me comes two days later -- that's the 13th of September -- when I addressed the NSA workforce to lay out our mission in a new environment. It was a short video talk; we beamed it throughout our headquarters at Fort Meade and globally throughout our global enterprise. Now, most of what I said was what anyone would expect. I tried to inspire: our work was important, the nation was depending on us. I tried to comfort: Look on the bright side, I said to them, right now a quarter billion Americans wish they had your job, being able to go after the enemy.

I ended the talk by trying to give a little perspective. I noted that all free peoples have had to balance the demands of liberty with the demands of security, and historically, historically we Americans have been able to plant our flag well down the spectrum toward liberty. Here was our challenge, I said, and I'm quoting from that presentation: "We are going to keep America free by making Americans feel safe again."

But to start the story with that Thursday, December 13th, is a bit misleading. It's a little bit like coming in near the end of the first reel of a movie. To understand that moment and that statement, you would have to know a little bit about what had happened to the National Security Agency in the preceding years.

Look, NSA intercepts communications, and it does so for only one purpose -- to protect the lives, the liberties and the well-being of the citizens of the United States from those who would do us harm. By the late 1990s, that job was becoming increasingly more difficult. The explosion of modern communications in terms of volume, variety, velocity threatened to overwhelm us.

The agency took a lot of criticism in those days, I know, criticism that it was going deaf, that it was ossified in its thinking, that it had not and could not keep up with the changes in modern communications. And all of that was only reinforced when all of the computer systems at Fort Meade went dark for three days in January of 2000 and we couldn't quickly or easily explain why. Those were really interesting times. As we were being criticized for being incompetent and going deaf, at the same time others seemed to be claiming that we were omniscient and we were reading your e-mails. The Washington Post and New Yorker Magazine during that time -- I'm talking 1999 now of 2000 -- they wrote, incorrectly, that -- and I'm quoting -- "NSA has turned from eavesdropping on the communists to eavesdropping on businesses and private citizens." And that -- and I'm quoting again -- "NSA has the ability to extend its eavesdropping network without limits." We are also referred to as a, quote, "global spying network that can eavesdrop on every single phone call, fax or e-mail anywhere on the planet."

I used those quotes in a speech I gave at American University in February of 2000. The great urban legend out there then was something called "Echelon" and the false accusation that NSA was using its capabilities to advance American corporate interests -- signals intelligence for General Motors, or something like that. You know, with these kinds of charges, the turf back then feels a bit familiar now. How could we prove a negative -- that we weren't doing certain things -- without revealing the appropriate things we were doing that kept America safe? You see, NSA had, NSA has an existential problem. In order to protect American lives and liberties, it has to be two things: powerful in its capabilities, and secretive in its methods. And we exist in a political culture that distrusts two things most of all: power and secrecy.

Modern communications didn't make this any easier. Gone were the days when signals of interest -- that's what NSA calls the things they want to copy -- gone were the days when signals of interest went along some dedicated microwave link between strategic rocket forces headquarters in Moscow and some ICBM in western Siberia. By the late '90s, what NSA calls targeted communications -- things like al Qaeda communications -- coexisted out there in a great global web with your phone calls and my e-mails. NSA needed the power to pick out the one, and the discipline to leave the others alone.

So, this question of security and liberty wasn't a new one for us in September of 2001. We've always had this question: How do we balance the legitimate need for foreign intelligence with our responsibility to protect individual privacy rights?

It's a question drilled into every employee of NSA from day one, and it shapes every decision about how NSA operates.

September 11th didn't change that. But it did change some things. This ability to intercept communication -- we commonly refer to it as Signals Intelligence or SIGINT. SIGINT is a complex business, with operational and technological and legal imperatives often intersecting and overlapping. There's routinely some freedom of action -- within the law -- to adjust operations. After the attacks, I exercised some options I've always had that collectively better prepared us to defend the homeland.

Look, let me talk for a minute about this, okay? Because a big gap in the current understanding, a big gap in the current debate is what's standard? What is it that NSA does routinely? Where we set the threshold, for example, for what constitutes inherent foreign intelligence value? That's what we're directed to collect. That's what we're required to limit ourselves to -- inherent foreign intelligence value. Where we set that threshold, for example, in reports involving a U.S. person shapes how we do our job, shapes how we collect, shapes how we report. The American SIGINT system, in the normal course of foreign intelligence activities, inevitably captures this kind of information, information to, from or about what we call a U.S. person. And by the way, "U.S. person" routinely includes anyone in the United States, citizen or not.

So, for example, because they were in the United States -- and we did not know anything more -- Mohamed Atta and his fellow 18 hijackers would have been presumed to have been protected persons, U.S. persons, by NSA prior to 9/11.

Inherent foreign intelligence value is one of the metrics we must use. Let me repeat that: Inherent foreign intelligence value is one of the metrics we must use to ensure that we conform to the Fourth Amendment's reasonable standard when it comes to protecting the privacy of these kinds of people. If the U.S. person information isn't relevant, the data is suppressed. It's a technical term we use; we call it "minimized." The individual is not even mentioned. Or if he or she is, he or she is referred to as "U.S. Person Number One" or "U.S. Person Number Two." Now, inherent intelligence value. If the U.S. person is actually the named terrorist, well, that could be a different matter. The standard by which we decided that, the standard of what was relevant and valuable, and therefore, what was reasonable, would understandably change, I think, as smoke billowed from two American cities and a Pennsylvania farm field. And we acted accordingly.

To somewhat oversimplify this, this question of inherent intelligence value, just by way of illustration, to just use an example, we all had a different view of Zacarias Moussaoui's computer hard drive after the attacks than we did before.

Look, this is not unlike things that happened in other areas.

Prior to September 11th, airline passengers were screened in one way. After September 11th, we changed how we screen passengers. In the same way, okay, although prior to September 11th certain communications weren't considered valuable intelligence, it became immediately clear after September 11th that intercepting and reporting these same communications were in fact critical to defending the homeland. Now let me make this point. These decisions were easily within my authorities as the director of NSA under an executive order, known as Executive Order 12333, that was signed in 1981, an executive order that has governed NSA for nearly a quarter century.

Now, let me summarize. In the days after 9/11, NSA was using its authorities and its judgment to appropriately respond to the most catastrophic attack on the homeland in the history of the nation. That shouldn't be a headline, but as near as I can tell, these actions on my part have created some of the noise in recent press coverage. Let me be clear on this point -- except that they involved NSA, these programs were not related -- these programs were not related -- to the authorization that the president has recently spoken about. Back then, September 2001, I asked to update the Congress on what NSA had been doing, and I briefed the entire House Intelligence Committee on the 1st of October on what we had done under our previously existing authorities.

Now, as another part of our adjustment, we also turned on the spigot of NSA reporting to FBI in, frankly, an unprecedented way. We found that we were giving them too much data in too raw form. We recognized it almost immediately, a question of weeks, and we made all of the appropriate adjustments. Now, this flow of data to the FBI has also become part of the current background noise, and despite reports in the press of thousands of tips a month, our reporting has not even approached that kind of pace. You know, I actually find this a little odd. After all the findings of the 9/11 commission and other bodies about the failure to share intelligence, I'm up here feeling like I have to explain pushing data to those who might be able to use it. And of course, it's the nature of intelligence that many tips lead nowhere, but you have to go down some blind alleys to find the tips that pay off.

Now, beyond the authorities that I exercised under the standing executive order, as the war on terror has moved forward, we have aggressively used FISA warrants. The act and the court have provided us with important tools, and we make full use of them. Published numbers show us using the court at record rates, and the results have been outstanding. But the revolution in telecommunications technology has extended the actual impact of the FISA regime far beyond what Congress could ever have anticipated in 1978. And I don't think that anyone can make the claim that the FISA statute is optimized to deal with or prevent a 9/11 or to deal with a lethal enemy who likely already had combatants inside the United States.

I testified in open session to the House Intel Committee in April of the year 2000. At the time, I created some looks of disbelief when I said that if Osama bin Laden crossed the bridge from Niagara Falls, Ontario to Niagara Falls, New York, there were provisions of U.S. law that would kick in, offer him protections and affect how NSA could now cover him. At the time, I was just using this as some of sort of stark hypothetical; 17 months later, this is about life and death.

So now, we come to one additional piece of NSA authorities. These are the activities whose existence the president confirmed several weeks ago. That authorization was based on an intelligence community assessment of a serious and continuing threat to the homeland. The lawfulness of the actual authorization was reviewed by lawyers at the Department of Justice and the White House and was approved by the attorney general.

Now, you're looking at me up here, and I'm in a military uniform, and frankly, there's a certain sense of sufficiency here -- authorized by the president, dually ordered, its lawfulness attested to by the attorney general and its content briefed to the congressional leadership.

But we all have personal responsibility, and in the end, NSA would have to implement this, and every operational decision the agency makes is made with the full involvement of its legal office. NSA professional career lawyers -- and the agency has a bunch of them -- have a well-deserved reputation. They're good, they know the law, and they don't let the agency take many close pitches.

And so even though I knew the program had been reviewed by the White House and by DOJ, by the Department of Justice, I asked the three most senior and experienced lawyers in NSA: Our enemy in the global war on terrorism doesn't divide the United States from the rest of the world, the global telecommunications system doesn't make that distinction either, our laws do and should; how did these activities square with these facts?

They reported back to me. They supported the lawfulness of this program. Supported, not acquiesced. This was very important to me. A veteran NSA lawyer, one of the three I asked, told me that a correspondent had suggested to him recently that all of the lawyers connected with this program have been very careful from the outset because they knew there would be a day of reckoning. The NSA lawyer replied to him that that had not been the case. NSA had been so careful, he said -- and I'm using his words now here -- NSA had been so careful because in this very focused, limited program, NSA had to ensure that it dealt with privacy interests in an appropriate manner. In other words, our lawyers weren't careful out of fear; they were careful out of a heartfelt, principled view that NSA operations had to be consistent with bedrock legal protections.

In early October, 2001, I gathered key members of the NSA workforce in our conference room and I introduced our new operational authority to them. With the historic culture of NSA being what it was and is, I had to do this personally. I told them what we were going to do and why. I also told them that we were going to carry out this program and not go one step further. NSA's legal and operational leadership then went into the details of this new task.

You know, the 9/11 commission criticized our ability to link things happening in the United States with things that were happening elsewhere. In that light, there are no communications more important to the safety of this country than those affiliated with al Qaeda with one end in the United States. The president's authorization allows us to track this kind of call more comprehensively and more efficiently. The trigger is quicker and a bit softer than it is for a FISA warrant, but the intrusion into privacy is also limited: only international calls and only those we have a reasonable basis to believe involve al Qaeda or one of its affiliates.

The purpose of all this is not to collect reams of intelligence, but to detect and prevent attacks. The intelligence community has neither the time, the resources nor the legal authority to read communications that aren't likely to protect us, and NSA has no interest in doing so. These are communications that we have reason to believe are al Qaeda communications, a judgment made by American intelligence professionals, not folks like me or political appointees, a judgment made by the American intelligence professionals most trained to understand al Qaeda tactics, al Qaeda communications and al Qaeda aims.

Their work is actively overseen by the most intense oversight regime in the history of the National Security Agency. The agency's conduct of this program is thoroughly reviewed by the NSA's general counsel and inspector general. The program has also been reviewed by the Department of Justice for compliance with the president's authorization. Oversight also includes an aggressive training program to ensure that all activities are consistent with the letter and the intent of the authorization and with the preservation of civil liberties.

Let me talk for a few minutes also about what this program is not. It is not a driftnet over Dearborn or Lackawanna or Freemont grabbing conversations that we then sort out by these alleged keyword searches or data-mining tools or other devices that so-called experts keep talking about.

This is targeted and focused. This is not about intercepting conversations between people in the United States. This is hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda. We bring to bear all the technology we can to ensure that this is so. And if there were ever an anomaly, and we discovered that there had been an inadvertent intercept of a domestic-to-domestic call, that intercept would be destroyed and not reported. But the incident, what we call inadvertent collection, would be recorded and reported. But that's a normal NSA procedure. It's been our procedure for the last quarter century. And as always, as we always do when dealing with U.S. person information, as I said earlier, U.S. identities are expunged when they're not essential to understanding the intelligence value of any report. Again, that's a normal NSA procedure.

So let me make this clear. When you're talking to your daughter at state college, this program cannot intercept your conversations. And when she takes a semester abroad to complete her Arabic studies, this program will not intercept your communications.

Let me emphasize one more thing that this program is not -- and, look, I know how hard it is to write a headline that's accurate and short and grabbing. But we really should shoot for all three -- accurate, short and grabbing. I don't think domestic spying makes it. One end of any call targeted under this program is always outside the United States. I've flown a lot in this country, and I've taken literally hundreds of domestic flights. I have never boarded a domestic flight in the United States of America and landed in Waziristan. In the same way -- and I'm speaking illustratively here now, this is just an example -- if NSA had intercepted al Qaeda Ops Chief Khalid Shaikh Mohammed in Karachi talking to Mohamed Atta in Laurel, Maryland, in say, July of 2001 -- if NSA had done that, and the results had been made public, I'm convinced that the crawler on all the 7 by 24 news networks would not have been "NSA domestic spying."

Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such.

I've said earlier that this program's been successful. Clearly not every lead pans out from this or any other source, but this program has given us information that we would not otherwise had been able to get.

It's impossible for me to talk about this any more in a public way without alerting our enemies to our tactics or what we have learned. I can't give details without increasing the danger to Americans. On one level, believe me, I wish that I could. But I can't.

Our enemy has made his intentions clear. He's declared war on us. Since September 11th, al Qaeda and its affiliates have continued to announce their intention, continued to act on their clearly stated goal of attacking America. They have succeeded against our friends in London, Madrid, Bali, Amman, Istanbul and elsewhere. They desperately want to succeed against us.

The 9/11 commission told us -- and I'm quoting them now -- "Bin Laden, and Islamist terrorists mean exactly what they say. To them, America is the fount of all evil, the head of the snake, and it must be converted or destroyed." Bin Laden reminded us of this intention as recently as last Thursday.

The people at NSA, and the rest of the intelligence community, are committed to defend us against this evil and to do it in a way consistent with our values. We know that we can only do our job if we have the trust of the American people, and we can only have your trust if we are careful about how we use our tools and our resources. That sense of care is part of the fabric of the community I represent. It helps define who we are.

I recently went out to Fort Meade to talk to the workforce involved in this program. They know what they have contributed, and they know the care with which it has been done. Even in today's heated environment, the only concern they expressed to me was continuing their work in the defense of the nation, and continuing to do so in a manner that honors the law and the Constitution. As I was talking with them -- we were in the office spaces there, typical office spaces anywhere in the world -- I looked out over their heads -- and this is the workforce that deals with the program the president discussed several weeks ago -- I looked out over their heads to see a large sign fixed to one of those pillars that go up through our operations building that breaks up the office space. That sign is visible from almost anywhere in this large area. It's yellow with bold black letters on it. The title is readable from 50 feet: What constitutes a U.S. person? And that title was followed by a detailed explanation of the criteria. That has always been the fundamental tenet of privacy for NSA. And here it was in the center of a room guiding the actions of a workforce determined to prevent another attack on the United States.

Security and liberty. The people at NSA know what their job is. I know what my job is too. I learned a lot from NSA and its culture during my six years there. But I come from a culture too. I've been a military officer for nearly 37 years, and from the start, I've taken an oath to protect and defend the Constitution of the United States. I would never violate that Constitution nor would I abuse the rights of the American people. As the director, I was the one responsible to ensure that this program was limited in its scope and disciplined in its application.

American intelligence, and especially American SIGINT, signals intelligence, is the frontline of defense in dramatically changed circumstances, circumstances in which if we fail to do our job well and completely, more Americans will almost certainly die. The speed of operations, the ruthlessness of the enemy, the pace of modern communications have called on us to do things and to do them in ways never before required. We've worked hard to find innovative ways to protect the American people and the liberties we hold dear. And in doing so, we have not forgotten who we are either.

Thank you. I'll be happy to take your questions.

MR. HILL: We have microphones on either end of the room, so if you can go to a microphone, and then choose people from there. All right, we will start with you.

Q Yes, Wayne Madsen, syndicated columnist. General, how do you explain the fact that there were several rare spectacles of whistleblowers coming forward at NSA, especially after 9/11, something that hasn't really happened in the past, who have complained about violations of FISA and United States Signals Intelligence Directive 18, which implements the law at the agency?

GEN. HAYDEN: I talked to the NSA staff on Friday. The NSA inspector general reports to me, as of last Friday, from the inception of this program through last Friday night, not a single employee of the National Security Agency has addressed a concern about this program to the NSA IG. I should also add that no member of the NSA workforce who has been asked to be included in this program has responded to that request with anything except enthusiasm. I don't know what you're talking about.

Q General Hayden, the FISA law says that the NSA can do intercepts as long as you go to the court within 72 hours to get a warrant.
I understood you to say that you are aggressively using FISA but selectively doing so. Why are you not able to go to FISA as the law requires in all cases? And if the law is outdated, why haven't you asked Congress to update it?

GEN. HAYDEN: Lots of questions contained there. Let me try them one at a time.

First of all, I need to get a statement of fact out here, all

right? NSA cannot -- under the FISA statute, NSA cannot put someone on coverage and go ahead and play for 72 hours while it gets a note saying it was okay. All right? The attorney general is the one who approves emergency FISA coverage, and the attorney general's standard for approving FISA coverage is a body of evidence equal to that which he would present to the court. So it's not like you can throw it on for 72 hours.
I
've talked in other circumstances -- I've talked this morning -- about how we've made very aggressive use of FISA. If you look at NSA reporting under this program -- you know, without giving you the X or Y axis on the graph -- NSA reporting under this program has been substantial but consistent. This is NSA counterterrorism reporting. Substantial but consistent. NSA reporting under FISA has gone like that. FISA has been a remarkably successful tool. We use it very aggressively.

In the instances where this program applies, FISA does not give us the operational effect that the authorities that the president has given us give us. Look. I can't -- and I understand it's going to be an incomplete answer, and I can't give you all the fine print as to why, but let me just kind of reverse the answer just a bit. If FISA worked just as well, why wouldn't I use FISA? To save typing? No. There is an operational impact here, and I have two paths in front of me, both of them lawful, one FISA, one the presidential -- the president's authorization. And we go down this path because our operational judgment is it is much more effective. So we do it for that reason. I think I've got -- I think I've covered all the ones you raised.

Q Quick follow-up. Are you saying that the sheer volume of warrantless eavesdropping has made FISA inoperative?

GEN. HAYDEN: No. I'm saying that the characteristics we need to do what this program's designed to do -- to detect and prevent -- make FISA a less useful tool. It's a wonderful tool, it's done wonderful things for the nation in terms of fighting the war on terror, but in this particular challenge, this particular aspect -- detect and prevent attacks -- what we're doing now is operationally more relevant, operationally more effective.

Q Sam Husseini from IPA Media. You just now spoke of, quote, "two paths," but of course the FISA statute itself says that it will be the exclusive means by which electronic surveillance may be pursued. Are you not, therefore, violating the law?

GEN. HAYDEN: That's probably a question I should deflect to the Department of Justice, but as I said in my comments, I have an order whose lawfulness has been attested to by the attorney general, an order whose lawfulness has been attested to by NSA lawyers who do this for a living. No, we're not violating the law.

Q You cited before the congressional powers of the president. Are you -- are you asserting inherent so-called constitutional powers that a -- to use the term that came up in the Alito hearings -- "a unitary executive" has to violate the law when he deems fit?

GEN. HAYDEN: I'm not asserting anything. I'm asserting that NSA is doing its job.

Q General, first, thank you for your comments. And I think you somewhat answered this in your response, and this goes to the culture and just to the average American. Let me just say this -- that domestic spying and the faith communities are outraged. Churches in Iowa, churches in Nebraska, mosques across the board are just outraged by the fact that our country could be spying on us. You made a point that the young lady at State Penn shouldn't have to worry, but we're worried that our country has begun to spy on us. We understand the need for terrorism and the need to deal with that, but what assurances -- and how can you answer this question, what can make Americans feel safe? How can the faith community feel safe that their country is not spying on them for any reason?

GEN. HAYDEN: Reverend, thanks for the question, and I'm part of the faith community too. And I've laid it out as well I could in my remarks here as to how limited and focused this program is, what its purpose is, that its been productive. We are not out there -- and again, let me use a phrase I used in the comments -- this isn't a drift net out there where we're soaking up everyone's communications. We are going after very specific communications that our professional judgment tells us we have reason to believe are those associated with people who want to kill Americans. That's what we're doing.
And I realize the challenge the we have. I mentioned earlier the existential issue that NSA has well before this program, that it's got to be powerful if it's going to protect us, and it's also got to be secretive if it's going to protect us. And that creates a tremendous dilemma. I understand that.

I'm disappointed I guess that perhaps the default response for some is to assume the worst. I'm trying to communicate to you that the people who are doing this, okay, go shopping in Glen burnie and their kids play soccer in Laurel, and they know the law. They know American privacy better than the average American, and they're dedicated to it.

So I guess the message I'd ask you to take back to your communities is the same one I take back to mine. This is focused. It's targeted. It's very carefully done. You shouldn't worry.

Q Just know, General, that the faith communities will take that back, but the faith communities are scared. Where does this stop?

Q Justine Redman with CNN. How was national security harmed by The New York Times reporting on this program? Don't the bad guys already assume that they're being monitored anyway, and shouldn't Americans, you know, bear in mind that they might be at any time?

GEN. HAYDEN: You know, we've had this question asked several times. Public discussion of how we determine al Qaeda intentions, I just -- I can't see how that can do anything but harm the security of the nation. And I know people say, "Oh, they know they're being monitored." Well, you know, they don't always act like they know they're being monitored. But if you want to shove it in their face constantly, it's bound to have an impact.

And so to -- I understand, as the Reverend's? question just raised, you know, there are issues here that the American people are deeply concerned with. But constant revelations and speculation and connecting the dots in ways that I find unimaginable, and laying that out there for our enemy to see cannot help but diminish our ability to detect and prevent attacks.

Q My name is Travis Morales. And we've read numerous reports in the Times and other papers about massive spying by the NSA on millions of people, along with reports of rendition, torture, et cetera. And I attended Congressman Conyers' hearings on Friday where a gentleman came from South Florida talking about military intelligence went and infiltrated his Quaker peace group, and that this -- they later saw the documents detailing that.
And my question -- I guess I have two questions for you. One is, as a participant in a group called, "The World Can't Wait: Drive Out the Bush Regime," which is organizing for people to drown out Bush's lies during the State of the Union, and to gather on February 4th demanding that Bush step down, my question is this: Are you or the NSA -- and when I say you, I mean the NSA in its entirety -- is it intercepting our e-mail communications, listening to our telephone conversations, et cetera? Because as Bush has said, you're either against us or you're with us, and they have asserted that whatever the president wants to do in time of war, whether it's holding people without charges or writing memos justifying torture, they can do that.
My second question is this -- related to that. I publicly challenge you and the NSA to an open debate, a public open debate that people can gather and listen to your responses, a debate on this warrantless wiretapping and spying on millions of people that have gone on across this country, because as the Reverend said, millions and millions of people are outraged. That is why people are talking impeachment, that is why people are demanding that Bush step down, because of this massive spying, the torture, the rendition, and everything else. So I challenge you to a public and open debate on these questions.

GEN. HAYDEN: What was the question?
(Laughter.)

Q Will you openly and publicly debate us -- myself -- in a forum that's open to the public, not restricted, on the NSA spying scandal and defend what has been said, and respond to the numerous reports about the NSA spying on millions of people? That is one question. And the second question is: Are you spying on or intercepting our communications, e-mails and telephone conversations of those of us who are organizing The World Can't Wait to Drive Out the Bush Regime?

GEN. HAYDEN: You know, I tried to make this as clear as I could in prepared remarks. I said this isn't a drift net, all right? I said we're not there sucking up coms and then using some of these magically alleged keyword searches -- "Did he say 'jihad'? Let's get --" I mean, that is not -- do you know how much time Americans spend on the phone in international calls alone, okay? In 2003, our citizenry was on the phone in international calls alone for 200 billion minutes, okay? I mean, beyond the ethical considerations involved here, there are some practical considerations about being a drift net. This is targeted, this is focused. This is about al Qaeda.

The other request about a public debate -- as I mentioned at the beginning of my prepared remarks, this is a somewhat uncomfortable position for someone in my profession to be in, laying out details of the program. One way of describing what you have invited me to would be, "Why don't you come out and tell the world how you're catching al Qaeda?" And I can't do that. That would be professionally irresponsible.

Q No, I asked, are you targeting us and people who politically oppose the Bush government, the Bush administration? Not a fishing net, but are you targeting specifically political opponents of the Bush administration? Because as Vice President Gore recently said, "It is much worse than people realize."

Q Good morning, General Hayden. Katie Schroeder (sp) with the Associated Press.

GEN. HAYDEN: Hi, Katie.

Q Two questions in two areas for you.
One, can you describe a little further who the targets of these collection are? Are you looking at individuals or are you looking at phone numbers, websites, e-mail addresses?
And then separately, you described two separate programs authorized after 9/11 -- or undertaken after 9/11 -- one by you, one by President Bush. Can you explain how the two relate?

GEN. HAYDEN: Sure. Thanks for the -- I'm sorry, how the two relate?

Q How the two relate.

GEN. HAYDEN: Yeah, thanks.
To kind of summarize, Katie, about the program -- about the changes I did -- I mean, that was essentially just downshifting. I mean, it was shifting the weight of the agency in the direction of targets that were suddenly more important. And the degree of reporting we were doing on those targets changed -- again, all within my authorities. The relationship between what I did and what I briefed the entire House Select Committee on Intelligence on on the 1st of October -- the relationship between that and what the president was authorized was simply that it involved NSA and it involved the war on terrorism. But that's the only connective tissue.

Oh, your first question. Are these individuals, are these phone numbers, are these e-mail accounts and so on? Hard for me to get into the specifics. I would just say that what it is we do is that we use our art form -- we use our science and our art to -- as best as we can, okay? -- specifically target communications we have reason to believe are associated with al Qaeda, and we use all of the tools, Katie, available to us to do that.

Q So you can't be any more specific than as to whether it's focused on individuals or phone numbers?

GEN. HAYDEN: I would love to, but I can't.

Q Okay.

Q James Rosen, McClatchy Newspapers.
General, you said that if this program had been in place before 9/11, you were pretty confident that you would have detected at least some of the hijackers' presence in the United States, maybe stopped the attack. If that's the case, why is this limited to communications where one person is overseas? Isn't it even more urgent if you've got communications within the United States between two people who might have al Qaeda links, and why aren't you pursuing that?
nd a second, sort of linked, question is, on the 72 hours, if what you said is true, if I understood it, then I and, I think, a lot of other reporters have been misreporting this. Can you explain, on the 72 hours -- (inaudible) -- because you said it's not true, but you didn't explain why it's not true.

GEN. HAYDEN: I'm sorry. To be very clear. We throw the language out and we all maybe lose precision as we do it. NSA just can't go up on a number for 72 hours while it finishes out the paperwork. The attorney general is the only one who can authorize what's called an emergency FISA. That's what we're talking about there, all right? So it's not -- my point was, that's not something that NSA under the FISA act can do on its own.
The first question was? I'm sorry.

Q Well, just a quick follow-up on that. I mean, can it be as quick as you call the attorney general, or the NSA director calls the attorney general, says, "We got to go up now," and he says, "Okay, fill out the paperwork"?

GEN. HAYDEN: The standard the attorney general must have is that he has sufficient evidence in front of him that he believes he can substantiate that in front of the FISA court.

Q Okay, and then --

GEN. HAYDEN: And the first question?

Q Okay, the first question was regarding potentially having been able to --

GEN. HAYDEN: Oh. Oh, yeah. I'm sorry. Yeah.

Q Why isn't it even more urgent to monitor communications of two al Qaeda folks within the United States?

GEN. HAYDEN: Okay. Primarily because NSA is a foreign intelligence agency, and this is about -- what we've talked about here today is about foreign intelligence. It's also about, as I tried to suggest in my comments, a balancing between security and liberty. And in one of the decisions that had been made collectively -- certainly I personally support it -- it's that one way we have balanced this is that we are talking about international communications. So it not only plays to the strength of NSA, it's an attempt to balance the consistent, continuing, legitimate questions of security and liberty. If we were to be drilled down on a specific individual to the degree that the judgment was we need all comms, we need domestic to domestic, that's the route we go through the FISA court in order to do that.

Q Thank you.

Q General, John Diamond, USA Today. Two questions, if I could. One, I wanted to, following up on what Katie (sp) was saying, wanted to try to make sure I understand something. I thought I heard you to say that the surveillance domestically going on under FISA has been expanding rapidly. That's publicly reported. At least the numbers.

GEN. HAYDEN: Right.

Q And that the quantity of the surveillance under the presidentially approved program has been about a steady state. I thought I understood you to be suggesting that the former was numerically greater, quantitatively a much greater surveillance program than the presidentially authorized one.

GEN. HAYDEN: Sorry, John. And thank you for allowing me to clarify this, all right? What I was talking about was effect, was product, was result. All right? And the presidential authorization has been a steady producer. All right? The point I wanted to make was, as we have moved forward on the war on terrorism, FISA has been increasingly effective in terms of results.

Q And then a different kind of question now on the congressional consultation issue. There are many things, it seems to me, that presidents can assert they can do without congressional approval; nevertheless, they seek congressional approval. There are presidents who have consistently argued that the War Powers Act does not apply; that they have the power to send troops into action, et cetera.

GEN. HAYDEN: Right. Right. Right.

Q And yet, it's felt that for the sense of national unity, the correct thing to do is to go to Congress and get approval.

GEN. HAYDEN: Right.

Q You've laid out an argument today -- the urgency of the situation, the reasonableness, the numerous lawyers who have approved this -- would suggest strongly that had it been presented to Congress, Congress would have approved it, would have agreed with the reasonableness of it. And there's a suggestion that by not going to Congress, except to merely inform a very limited number of members, the unspoken message was: We don't feel we could have gotten the approval. The other potential message is that the secret would have leaked out, which seems to be a disturbing message, if that's what you're saying, that the committee, the oversight committee, the intelligence oversight committee can't keep a secret.

Sorry for the long-winded --

GEN. HAYDEN: Yeah, let me take a run, though.
We did brief Congress, John, as you know. It's been announced more than a dozen times. I've been the briefer. Every time that's happened, I've been there. And my intent there, in ways less restricted than I've had to operate here, was to make sure that the people in the room fully understood what had been authorized and what we have been doing.

One additional aspect that I would suggest to you I think is very important, is that -- and I will take no view on the, you know, political step of going to the Congress for an amendment of the FISA Act, and so on, and so forth. But I will offer you an operational point, and the operational point is this; if we had done that, if we will do that, if we were to do that, I would hope we would do it in such a way that the legitimate debate and legitimate discussions of that step do not betray to the enemy the tactics, techniques and procedures that we are now using to detect them.

Q Hi, General. I'm Leigh Ann Caldwell with Pacifica Radio.
You said that you used your top counsel in the planning process to tell you if this was legal and appropriate back in 2001. What exactly did your counsel tell you that it was within guidelines and within the law, constitutional law?

GEN. HAYDEN: I think my counsel, if he were here, would be whispering something about privileged lawyer-client language.
I can tell you in general, all right? And we talked about this in a bit more detail. They came back rather emphatically -- I did it to three, and I did it to three separately and serially so it wasn't a group answer. And all three came back saying that they believed this was lawful; that it was a lawful order that had been authorized by the president, that it was within his authorities to authorize this activity.
Q Well, a follow-up. There's been lawsuits saying that it violates the First and the Fourth Amendment. And wasn't that before the Patriot Act was expanded to give the presidential (sic) more powers -- or was passed to give the presidential (sic) more expanded powers?

GEN. HAYDEN: I honestly don't know. I'm not sure of the sequencing.

Q Okay. But you can't say what laws --

GEN. HAYDEN: The arguments that they use?

Q Yeah.

GEN. HAYDEN: No, they don't -- these guys are expert on the FISA Act. They're expert on something called USSID 18, which is kind of our library of instructions of how to conduct SIGINT and protect privacy. They're also really expert on the Constitution, and they're really expert on the Fourth Amendment. And so when I talked to them, I mean, I said there was an air of sufficiency with what I'd been given, but this was personal, and these are men that I had worked with. These are men who had said, no, you can't do that; no, we advise against doing that. In previous events, you know, the proceeding two-and-a-half-three years, I had been director, and so you know, they weren't freebies. They just didn't hand out hall passes for anything that might have been operationally effective or some things the agency might have wanted to do. They were hard. They were tough.

And so on a personal basis to me, when the three of them came back and said it's good to go, it meant a lot to me, and it meant a lot to the agency too, because as I said, the agency had to implement this, and the agency does everything -- everything -- with a lawyer looking over their shoulder. We know -- we know what this is. This is electronic surveillance for a foreign intelligence purpose. We know what the Constitution says, and so it's done very, very carefully. And I was very heartened that I got that response from the senior legal team we have.

Q And was it necessary to get anymore info from the DOJ, or was it -- was your legal counsel all that you needed?

GEN. HAYDEN: I had -- this was personal. This was after -- or simultaneous with DOJ and White House averring to the lawfulness of the program.

Q Okay. Thank you.

Q Yes, General. Muso Slayman (sp) with Al Mustaf Balarabi (sp). Does NSA now, currently, listen to conversation from overseas to U.S. citizen traveling abroad or diplomats that stationed abroad? The other question -- I want to quote you -- you said, you listen to individual or to the calls "that we believe associated with al Qaeda," and you mentioned the issue of focus many times. Now, how you reach the level of believing? I mean, give us just an indication without divulging any secrets here how it's determined, because in the Arab and Muslim community -- Arab American and Muslim American in United States -- bin Laden was not able to recruit any one of them, but they feel that they are being profiled, under threat, under constant harassment, et cetera, et cetera. So is it open season on the Arab American and Muslim American in United States that any conversation, that it is believed to be associated with al Qaeda?

GEN. HAYDEN: Thank you very much for asking that question. That gives me an opportunity. That's why I was almost -- so emphatic in my prepared remarks about this not being a drift net over parts of the United States, and then we sort through by key words or some other things.

This is not this at all. If we are intercepting a communication, it is because we have reason to believe that one or both communicants are affiliated with al Qaeda. That's our criteria.

Q Why they are not already in jail, General?

GEN. HAYDEN: Well, in some cases the communicant affiliated with al Qaeda is not in the United States.

Now, you asked earlier about the -- how confident are you. This is both art and science. We use every tool available to us. We have the best people at the National Security Agency and the best technology of the National Security Agency on this effort. You know, I don't want to be overly dramatic here, I really don't. We use signals intelligence for a lot of things. We use signals intelligence to support America's armed forces. The tools and techniques and tactics and procedures we use to determine "Is this an al Qaeda communication?" are the same tools, techniques, tactics and procedures we use to tell America's armed forces that you can go ahead and put a 500-pound bomb on that target. It's the same art and science. So this is not done -- what I'm saying is, this is not done idly.

Q Okay, just the first part of my question --

MR. HILL: Excuse me --

Q I'm not -- yeah, I'm following it up. The first part of my question.

MR. HILL: Okay, I have to cut you off here.
We have time for two more questions. And if you can keep them fairly brief, we'd appreciate it.
First you, then the gentleman in the red.

Q Yeah, but --

MR. HILL: I'm sorry.

Q The first question that I asked --

MR. HILL: Excuse me. I'm sorry --

Q -- about U.S. citizen abroad.

MR. HILL: All right. Go ahead.

GEN. HAYDEN: I'm sorry, I didn't -- I apologize, I didn't understand the question, the first question. I'm sorry.

Q Jim Bamford. Good seeing you here in the Press Club, General,

GEN. HAYDEN: Hey, Jim.

Q Hope we see more of you here.

Just to clarify sort of what's been said, from what I've heard you say today and an earlier press conference, the change from going around the FISA law was to -- one of them was to lower the standard from what they call for, which is basically probable cause to a reasonable basis; and then to take it away from a federal court judge, the FISA court judge, and hand it over to a shift supervisor at NSA. Is that what we're talking about here -- just for clarification?

GEN. HAYDEN: You got most of it right. The people who make the judgment, and the one you just referred to, there are only a handful of people at NSA who can make that decision. They're all senior executives, they are all counterterrorism and al Qaeda experts. So I -- even though I -- you're actually quoting me back, Jim, saying, "shift supervisor." To be more precise in what you just described, the person who makes that decision, a very small handful, senior executive. So in military terms, a senior colonel or general officer equivalent; and in professional terms, the people who know more about this than anyone else.

Q Well, no, that wasn't the real question. The question I was asking, though, was since you lowered the standard, doesn't that decrease the protections of the U.S. citizens? And number two, if you could give us some idea of the genesis of this. Did you come up with the idea? Did somebody in the White House come up with the idea? Where did the idea originate from?
Thank you.

GEN. HAYDEN: Let me just take the first one, Jim. And I'm not going to talk about the process by which the president arrived at his decision.

I think you've accurately described the criteria under which this operates, and I think I at least tried to accurately describe a changed circumstance, threat to the nation, and why this approach -- limited, focused -- has been effective.

MR. HILL: Final question.

Q Jonathan Landay with Knight Ridder. I'd like to stay on the same issue, and that had to do with the standard by which you use to target your wiretaps. I'm no lawyer, but my understanding is that the Fourth Amendment of the Constitution specifies that you must have probable cause to be able to do a search that does not violate an American's right against unlawful searches and seizures. Do you use --

GEN. HAYDEN: No, actually -- the Fourth Amendment actually protects all of us against unreasonable search and seizure.

Q But the --

GEN. HAYDEN: That's what it says.

Q But the measure is probable cause, I believe.

GEN. HAYDEN: The amendment says unreasonable search and seizure.

Q But does it not say probable --

GEN. HAYDEN: No. The amendment says --

Q The court standard, the legal standard --

GEN. HAYDEN: -- unreasonable search and seizure.

Q The legal standard is probable cause, General. You used the terms just a few minutes ago, "We reasonably believe." And a FISA

court, my understanding is, would not give you a warrant if you went before them and say "we reasonably believe"; you have to go to the FISA court, or the attorney general has to go to the FISA court and say "we have probable cause." And so what many people believe -- and I'd like you to respond to this -- is that what you've actually done is crafted a detour around the FISA court by creating a new standard of "reasonably believe" in place in probable cause because the FISA court will not give you a warrant based on reasonable belief, you have to show probable cause.
Could you respond to that, please?

GEN. HAYDEN: Sure. I didn't craft the authorization. I am responding to a lawful order. All right? The attorney general has averred to the lawfulness of the order.

Just to be very clear -- and believe me, if there's any amendment to the Constitution that employees of the National Security Agency are familiar with, it's the Fourth. And it is a reasonableness standard in the Fourth Amendment. And so what you've raised to me -- and I'm not a lawyer, and don't want to become one -- what you've raised to me is, in terms of quoting the Fourth Amendment, is an issue of the Constitution. The constitutional standard is "reasonable." And we believe -- I am convinced that we are lawful because what it is we're doing is reasonable.

Q (Off mike.)

MR. HILL: I'm sorry.
Thank you very much, General Hayden.
And with that, this proceeding is over. Thank you.
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END

EXHIBIT 9

Wartime Executive Power and the NSA's Surveillance Authority Before the Senate Judiciary Committee, 109th Congress (Feb. 6, 2006).

WARTIME EXECUTIVE POWER AND THE NATIONAL SECURITY AGENCY'S SURVEILLANCE AUTHORITY

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MONDAY, FEBRUARY 6, 2006

United States Senate,
Committee on the Judiciary,
Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in room SH-216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman Specter. It is 9:30. The Judiciary Committee will now proceed with our hearing on the administration's program administered by the National Security Agency on surveillance.

We welcome the Attorney General of the United States here today, who will be testifying. We face as a Nation, as we all know, an enormous threat from international terrorism. The terrorists attacked this country on 9/11, and we remain in danger of renewed terrorist attacks.

The President of the United States has the fundamental responsibility to protect the country, but even as the Supreme Court has said, the President does not have a blank check. And this hearing is designed to examine the legal underpinnings of the administration's program from the point of view of the statutory interpretation and also from the point of view of constitutional law.

The Foreign Intelligence Surveillance Act was passed in 1978 and has a forceful and blanket prohibition against any electronic surveillance without a court order. That law was signed by President Carter with a signing statement that that was the exclusive way for electronic surveillance. There is beyond a constitutional issue as to whether the President has inherent powers under Article II of the Constitution to undertake a program of this sort. If the President has constitutional authority, that trumps and supersedes the statute. The Constitution is the fundamental law of the country, and a statute cannot be inconsistent with a constitutional provision.

We will be examining the administration's contention that, notwithstanding the Foreign Intelligence Surveillance Act, there is statutory authority for what the President has done by virtue of the resolution of Congress authorizing the use of force against the terrorists. I have already expressed myself as being skeptical of that interpretation, but I believe the administration is entitled to a full and fair opportunity to advance their legal case on that important issue.

We will be examining with the Attorney General the generalized rules of statutory interpretation. One of them is that a repeal by implication is disfavored and that the specific governs the generalizations. And in the Foreign Intelligence Surveillance Act you have the specific prohibition contrasted with the generalized authority under the resolution for the authorization for the use of force.

I sent a letter to the Attorney General propounding some 15 questions, and I thank the Attorney General for his responses, and they will provide to a substantial extent the framework for our discussion here today. One of the key points on my mind is the role of the Foreign Intelligence Surveillance Court, and one of the questions which I asked of the Attorney General was the role of the court in granting permission in advance, the role of the court in granting permission within 72 hours after the President exercises surveillance authority, and beyond that, the issue as to whether the administration might now consider having the Foreign Intelligence Surveillance Court review this entire issue.

The whole question of probable cause is one with very substantial flexibility under our laws, depending upon the circumstances of the case. The Foreign Intelligence Surveillance Court has a great reputation for integrity, no leaks--candidly, unlike the Congress; candidly, unlike the administration; candidly, unlike all of Washington, perhaps all of the world. But when that court has secrets, they keep the secrets, and they also are well respected in terms of their technical competence.

One of the questions, the lead question, which I will be asking the Attorney General is whether the administration would consider sending this entire program to the court for their evaluation. The scope of this hearing is to examine the law on the subject, and the ground rules are that we will not inquire into the factual underpinnings of what is being undertaken here. That is for another Committee and for another day. That is for the Intelligence Committee and that is for a closed session.

It may be that some of the questions which we will ask the Attorney General on legal issues may in his mind require a closed session, and if they do, we will accommodate his request in that regard.

One of the other questions which I will be directing to the Attorney General following up on the letter is the practice of making disclosures only to the so-called Gang of 8--the Speaker and the Democrat Leader in the House, the Majority Leader and the Democrat Leader in the Senate, and the Chairmen and Vice Chairmen of the two Intelligence Committees--and the adequacy of that in terms of the statute which calls for disclosure to the committees, and the committees are much broader. And if the administration thinks that the current law is too broad, they have the standing to ask us to change the law, and we would certainly consider that on a showing of necessity to do so.

We have told the Attorney General we would require his presence all day. We will have 10-minute rounds, which is double what is the practice of this Committee, and as I have announced in advance, we will have multiple rounds.

There has been some question about swearing in the Attorney General, and I discussed that with the Attorney General, who said he would be willing to be sworn. After reflecting on the matter, I think it is unwarranted because the law provides ample punishment for a false official statement or a false statement to Congress. Under the provisions of 18 United States Code 1001 and 18 United States Code Section 1505, the penalties are equivalent to those under the perjury laws.

There has been a question raised as to legal memoranda within the Department, and at this time and on this showing, it is my judgment that that issue ought to be reserved to another day. I am sure it will come up in the course of questioning. The Attorney General will have an opportunity to amplify on the administration's position. But there is a fairly well-settled doctrine that internal memoranda within the Department of Justice are not subject to disclosure because of the concern that it would have a chilling effect, that if lawyers are concerned that what they write may later be subjected to review by others, they will be less than candid in their positions.

This Committee has faced those issues in recent times with requests for internal memoranda of Chief Justice Roberts, and they were not produced, and they were more relevant there than here because of the issue of finding some ideas as to how Chief Justice Roberts would function on the Court if confirmed. Here we have legal issues, and lawyers on this Committee and other lawyers are as capable as the Department of Justice in interpreting the law.

One other issue has arisen, and that is the issue of showing of video, and I think that would not be in order. The transcripts of what the President said and the transcripts of what you, Mr. Attorney General, said earlier in a discussion with Senator Feingold are of record. This is not a Sunday morning talk show, and the transcripts contain the full statement as to legal import and legal effect, and I am sure that those statements by the President and those statements by you will receive considerable attention by this Committee.

That is longer than I usually talk, but this is a very big subject.

Senator Feingold. Mr. Chairman?

Chairman Specter. This is the first of a series of hearings, at least two more, because of the very profound and very deep questions which we have here beyond statutory interpretation and the constitutional implications of the President's Article II powers. And this is all in the context of the United States being under a continuing threat from terrorism. But the beauty of our system is the separation of powers, the ability of the Congress to call upon the administration for responses, the response of the Attorney General in being willing to come here today, and then the Supreme Court to resolve any conflicts.

Senator Feingold. Mr. Chairman?

Chairman Specter. I would like to yield now--

Senator Feingold. Mr. Chairman?

Chairman Specter. --to the distinguished Ranking--

Senator Feingold. Can I just ask a quick clarification?

Chairman Specter. Senator Feingold?

Senator Feingold. I heard your judgment about whether the witness should be sworn. What would be the distinction between this occasion and the confirmation hearing where he was sworn?

Chairman Specter. The distinction is that it is the practice to swear nominees for Attorney General or nominees for the Supreme Court or nominees for other Cabinet positions. But the Attorneys General have appeared here on many occasions in the 25 years that I have been here, and there might be a showing, Senator Feingold, to warrant swearing.

Senator Feingold. Mr. Chairman, I would just say that the reason that anyone would want him sworn has to do with the fact that certain statements were made under oath at the confirmation hearing, so it seems to me logical that since we are going to be asking about similar things that he should be sworn on this occasion as well.

Senator Leahy. And, Mr. Chairman, if I might on that point--if I might on that point, of course, the Attorney General was sworn in on another occasion other than his confirmation when he and Director Mueller appeared before this Committee for oversight. And I had asked the Chairman, as he knows, earlier that he should be sworn on this. And I made that request right after the press had pointed out where an answer to Senator Feingold appeared not to have been truthful. And I felt that that is an issue that is going to be brought up during this hearing, and we should go into it.

I also recall the Chairman and other Republicans insisting that former Attorney General Reno be sworn when she came up here on occasions other than her confirmation.

I think because, especially because of the article about the questions of the Senator from Wisconsin, Senator Feingold. I believe he should have been sworn. That is obviously the prerogative of the Chairman, but I would state again, and state strongly for the record what I have told the Chairman privately. I think in this instance, similar to what you did in April with Attorney General Gonzales and Director Mueller, both of whom were sworn, and as the Chairman insisted with then-Attorney General Reno, I believe he should be sworn.

Chairman Specter. Senator Leahy and I have not disagreed on very much in the more than a year since we worked together as ranking and Chairman, and I think it has strengthened the Committee. I did receive the request. I went back and dug out the transcript, and reviewed Senator Feingold's vigorous cross-examination of the Attorney General at the confirmation hearings, and I know the issues as to torture, which Senator Feingold raised, and the issues which Senator Feingold raised as to searches without warrants. I have reviewed the provisions of 18 USC 1001 and the case involving Admiral Poindexter, who was convicted under that provision. I have reviewed the provisions of 18 United States Code 1505, where Oliver North was convicted, and there are penalties provided there commensurate with perjury. It is my judgment that it is unnecessary to swear the witness.

Senator Leahy. Mr. Chairman, may I ask, if the witness has no objection to being sworn, why not just do it and not have this question raised here? I realize only the Chairman can do the swearing in. Otherwise, I would offer to give him the oath myself, insofar as he said he would this morning be sworn in, but if he is willing to be, why not just do it?

Senator Sessions. Mr. Chairman?

Chairman Specter. The answer to why I am not going to do it is that I have examined all the facts, and I have examined the law, and I have asked the Attorney General whether he would object or mind, and he said he would not, and I have put that on the record. But the reason I am not going to swear him in, it is not up to him. Attorney General Gonzales is not the Chairman. I am. And I am going to make the ruling.

Senator Sessions. Mr. Chairman?

Senator Feingold. Mr. Chairman?

Senator Leahy. Mr. Chairman, I would point out that he has been here before this Committee three times. The other two times he was sworn. It seems unusual not to swear him this time.

Senator Durbin. Mr. Chairman, I move the witness be sworn.

Chairman Specter. The Chairman has ruled. If there is an appeal from the ruling of the Chair, I have a pretty good idea how it is going to come out.

Senator Durbin. Mr. Chairman, I appeal the ruling of the Chair.

Chairman Specter. All in favor of the ruling of the Chair say "aye."

[Chorus of ayes.]

Senator Schumer. Roll call.

Chairman Specter. Opposed?

Senator Leahy. Roll call has been requested.

Senator Feingold. Mr. Chairman, ask for a roll call vote.

Chairman Specter. The clerk will call the roll. I will call the roll.

[Laughter.]

Chairman Specter. Senator Hatch?

Senator Hatch. No.

Chairman Specter. Senator Grassley?
Senator Grassley. No.
Chairman Specter. Senator Kyl?
Senator Kyl. Mr. Chairman, is the question to uphold or to reject the ruling?
Chairman Specter. The question is to uphold the ruling of the Chair, so we are looking for ayes here, Senator.
[Laughter.]
Senator Leahy. But we are very happy with the noes that have started on the Republican side, being the better position.
Senator Hatch. I am glad somebody clarified that.
Chairman Specter. The question is, should the ruling of the Chair be upheld that Attorney General Gonzales not be sworn?
Senator Hatch. Aye.
Senator Grassley. Aye.
Senator Kyl. Aye.
Senator DeWine. Aye.
Senator Sessions. Aye.
Senator Graham. Aye.
Senator Cornyn. Aye.
Chairman Specter. By proxy, for Senator Brownback, aye.
Senator Coburn?
[No response.]
Chairman Specter. We have enough votes already.
Senator Leahy?
Senator Leahy. Emphatically, no.
Senator Kennedy. No.
Senator Biden. No.
Senator Kohl. No.
Senator Feinstein. No.
Senator Feingold. No.
Senator Schumer. No.
Senator Durbin. No.
Chairman Specter. Aye. The ayes have it.
Senator Feingold. Mr. Chairman, I request to see the proxies given by the Republican Senators.
Chairman Specter. Would you repeat that, Senator Feingold?
Senator Feingold. I request to see the proxies given by the Republican Senators.
Chairman Specter. The practice is to rely upon the staffers, but without counting that vote--well, we can rephrase the question if there is any serious challenge of the proxies. This is really not a very good way to being this hearing, but I found that patience is a good practice here.
Senator Sessions. Mr. Chairman?
Chairman Specter. Senator Sessions?
Senator Sessions. I am very disappointed that we went through this process. This Attorney General, in my view, is a man of integrity, and having read the questions, as you have, as should Feingold put forward, and his answers, I will believe he will have a perfect answer to those questions when they come up at this hearing, and I do not believe they are going to show he perjured himself in any way or was inaccurate in what he said. I

remember having a conversation with General Meyers and Secretary of Defense Rumsfeld, and one of the saddest days in their career was having to come in here and stand before a Senate Committee and raise their hand as it they are not trustworthy in matters relating to the defense of this country. And I think that is it not necessary that a duly confirmed cabinet member have to routinely stand up and just give an oath when they are, in effect, under oath and subject to prosecution if they do not tell the truth.

I think it is just a question of propriety and good taste, and due respect from one branch to the other, and that is why I would support the Chair.

Senator Leahy. Mr. Chairman, I do not--

Chairman Specter. Let us not engage in protracted debate on this subject. We are not going to swear this witness and we have the votes to stop it.

Senator Leahy?

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator Leahy. Mr. Chairman, I stated my position why I believe he should be sworn in, but I understand that you have the majority of votes.

Now the question for this hearing goes into the illegality of the Government's domestic spying on ordinary Americans without a warrant.

The question facing us is not whether the Government should have all the tools it needs to protect the American people. Of course it should. Every single member of Congress agrees they should have all the tools necessary to protect the American people. The terrorist threat to America's security remains very real. We should have the tools to protect America's security. That is why I co-authored the PATRIOT Act five years ago, and why it passed with such broad bipartisan support, and I would also remind everybody that is why we amended FISA, the Foreign Intelligence Surveillance Act, five times since 9/11 to give it more flexibility, twice during the time when I was Chairman.

We all agree that if you have al Qaeda terrorists calling we should be wiretapping them. We do not even need authority to do that overseas, and certainly going into, so far, the unsuccessful effort to catch Osama bin Laden in Afghanistan. Congress has given the President authority to monitor al Qaeda messages legally with checks to guard against abuses when Americans' conversations and e-mails are being monitored. But instead of doing what the President has the authority to do legally, he decided to do it illegally without safeguards.

A judge from the special court Congress created to monitor domestic spying would grant any request to monitor an al Qaeda terrorist. Of the approximately 20,000 foreign intelligence warrant applications to these judges over the past 28 years, about a half dozen have been turned down.

I am glad the Chairman is having today's hearing. We have precious little oversight in this Congress, but the Chairman and I have a long history of conducting vigorous bipartisan oversight investigation, and if Congress is going to serve the role it should, instead of being a rubber stamp for whoever is in the Executive, we have to have these kind of oversights.

The domestic spying programs into e-mails and telephone calls, apparently conducted by the National Security Agency, was first reported by the New York Times on December 16, 2005. The next day President Bush publicly admitted that secret domestic wiretapping has been conducted without warrants since late 2001, and he has issued secret orders to do this more than 30 times.

We have asked for those presidential orders allowing secret eavesdropping on Americans. They have not been provided. We have asked for official legal opinions of the Government that the administration say justify this program. They too have been withheld from us.

The hearing is expressly about the legality of this program. It is not about the operational details. It is about whether we can legally spy on Americans. In order for us to conduct effective oversight, we need the official documents to get those answers. We are an oversight committee of the United States Senate, the oversight committee with jurisdiction over the Department of Justice and over its enforcement of the laws of the United States. We are the duly-elected representatives of the United States. It is our duty to determine where the laws of the United States have been violated. The President and the Justice Department have a constitutional duty to faithfully execute the laws. They do not write the laws. They do not pass the laws. They do not have unchecked powers to decide what laws to follow, and they certainly do not have the power to decide what laws to ignore. They cannot violate the laws of the rights of ordinary Americans.

Mr. Attorney General, in America, our America, nobody is above the law, not even the President of the United States.

There is much that we do not know about the President's secret spying program. I hope we are going to get some more answers, some real answers, not self-serving characterizations.

Let's start with what we do know. Point one, the President's secret wiretapping program is not authorized by the Foreign Intelligence Surveillance Act.

The law expressly states it provides the exclusive source of authority for wiretapping for intelligence purposes. Wiretapping that is not authorized under this is a Federal crime. That is what the law says. It is also what the law means. This law was enacted to define how domestic surveillance for intelligence purposes can be conducted while protecting the fundamental rights of Americans.

A couple of generations of American are too young to know why we passed this law. It was enacted after decades of abuses by the Executive, including the wiretapping of Dr. Martin Luther King, and other political opponents of early Government officials. After some of the so-called White House enemies on the Nixon White House enemies list, during that time another President asserted he did what was legal because he was President, and being President, he could do whatever he wanted to do.

The law has been updated five times since September 11, 2001. It provides broad and flexible authority. In fact, on July 31, 2002, your Justice Department testified this law is a highly flexible statute that has been proven effective. And you noted, "When you are trying to prevent terrorist acts, that is really what FISA was intended to do and it was written with that in mind."

But now the Bush administration concedes the President knowingly created a program involving thousands of wiretaps of Americans in the United States over the periods of the last four or five years without complying with FISA.

And legal scholars and former Government officials, including many Republicans, have been almost unanimous in stating the obvious, this is against the law, and point to the authorization for the use of military force that Democratic and Republican lawmakers joined together to pass in the days immediately after the September 11 attacks did not give the President the authority to go around the FISA law to wiretap Americans illegally.

That authorization said to capture or kill Osama bin Laden, and to use the

American military to do that. It did not authorize domestic surveillance of American citizens.

Let me be clear. Some Republican Senators say that we are talking about special rights for terrorists. I have no interest in that, just like very member of this Committee and thousands of our staffs, and every member of the House of Representatives. I go to work every single day in a building that was targeted for destruction by al Qaeda. Of course, I want them captured. I wish the Bush administration had done a better job. I wish that when they almost had Osama bin Laden, they had kept on after him and caught him, and destroyed him, rather than taking our Special Forces out of Afghanistan and sending them precipitously into Iraq.

My concern is the laws of America, and my concern is when we see peaceful Quakers being spied upon, where we see babies and nuns who cannot fly in airplanes because they are on a terrorist watch list put together by your Government.

And point three, the President never came to Congress and never sought additional legal authority to engage in the type of domestic surveillance in which NSA has been secretly engaged for the last several years.

After September 11, 2001, I led a bipartisan effort to provide legal tools. We passed amendments to FISA. We passed the U.S. PATRIOT Act, and we upgraded FISA four times since then. In fact, when a Republican Senator on this Committee proposed a legal change to the standards needed for a FISA warrant, the Bush administration did not support that effort, but raised questions about it and said it was not needed. The administration told the Senate that FISA was working just fine.

You, Mr. Attorney General, said the administration did not ask for legislation authorizing warrantless wiretapping of Americans, did not think such legislation would pass. Who did you ask? You did not ask me. You did not ask Senator Specter.

Not only did the Bush administration not seek broader legal authority, it kept its very existence of this illegal wiretapping program completely secret from 527 of the 535 members of Congress, including members of this Committee and members ont Intelligence Committee.

The administration has not suggested to Congress and the American people that FISA was inadequate, outmoded or irrelevant. You never did that until the press caught you violating the statute with the secret wiretapping of Americans without warrants. In fact, in 2004, two years after you authorized the secret warrantless wiretapping the program--and this is a tape we are told we cannot show--the President said, "Anytime you hear the United States Government talking about wiretap, a wiretap requires a court order. Nothing has changed...When we're talking about chasing down terrorists, we're talking about getting a court order before we do so." That was when he was running for reelection. Today we know at the very least, that statement was misleading.

Let me conclude with this. I have many questions for you. But first, let me give you a message, Mr. Attorney General, to you, to the President and to the administration. This is a message that should be unanimous from every single member of Congress, no matter what their party of their ideology. Under out Constitution, Congress is a co-equal branch of Government, and we make the laws. If you believe you need new laws, then come and tell us. If Congress agrees, we will amend the law. If you do not even attempt to persuade Congress to amend the law, then you are required to follow the law as it is written. That is true of the President, just as it is true of me and you and every American. That is a rule of law. That is a rule on which our Nation was found. That is a rule on which it endures and prospers.

Thank you, Mr. Chairman.

Chairman Specter. Thank you, Senator Leahy.

We turn now to the Attorney General of the United States, Alberto R. Gonzales. The Attorney General has held the office for a little over a year. Before that he was Counsel to the President, right after the President's inauguration in 2001. He had served in State Government with Governor Bush. He attended the U.S. Air Force Academy from 1975 to 1977, graduated from Rice University for a bachelor's degree, and from the Harvard Law School, and was a partner in the distinguished of Vinson and Elkins in Houston before going into State Government.

We have allotted 20 minutes for your opening statement, Mr. Attorney General, because of the depth and complexity and importance of the issues which you and we will be addressing. You may proceed.

STATEMENT OF HON. ALBERTO R. GONZALES, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Attorney General Gonzales. Good morning, Chairman Specter, Senator Leahy and members of the Committee. I am pleased to have this opportunity to speak with you.

And let me just add for the record, when Chairman Specter asked me whether I would be willing to go under oath, I did say I would have no objections. I also said that my answers would be the same, whether or not I was under oath or not.

Al Qaeda and it affiliates remain deadly dangerous. Osama bin Laden recently warned America, "Operations are under preparation and you will see them in your homes." Bin Laden's deputy, Ayman Al-Zawahiri added just days ago that the American people are, and again I quote, "destined for a future colored by blood, the smoke of explosions and the shadows of terror."

None of us can afford to shrug off warnings like this or forget that we remain a Nation at war. Nor can we forget that this is a war against a radical and unconventional enemy. Al Qaeda has no boundaries, no government, no standing army. Yet they are capable of wreaking death and destruction on our shores. And they have sought to fight us not just with bombs and guns. Our enemies are trained in the most sophisticated communications, counterintelligence, and counter-surveillance techniques, and their tactics, they are constantly changing.

They use video feed and worldwide television networks to communicate with their forces, e-mail, the Internet and cell phones to direct their operations, and even our own training academies to learn how to fly aircraft as suicide-driven missiles.

To fight this unconventional war, while remaining open and vibrantly engaged with the world, we must search out the terrorists abroad and pinpoint their cells here at home. To succeed we must deploy not just soldiers and sailors and airmen and marines, we must also depend on intelligence analysts, surveillance experts, and the nimble use of our technological strength.

Before 9/11 terrorists were clustered throughout the United States preparing their assault. We know from 9/11 Commission report that they communicated with their superiors abroad using e-mail, the Internet and telephone. General Hayden, the Principal Deputy Director of National Intelligence, testified last week before the Senate that the terrorist surveillance program instituted after 9/11 has helped us detect and prevent terror plots in the United States and abroad. Its continuation is vital to the national defense.

Before going any further, I should make clear what I can discuss today. I am here to explain the Department's assessment that the President's terrorist surveillance program is consistent with our laws and the Constitution. I am not here to discuss the operational details of that program or any other classified activity. The President has described the terrorist surveillance program in response to certain leaks. And my discussion in this open forum must be limited to those facts the President has publicly confirmed, nothing more.

Many operational details of our intelligence activities remain classified and unknown to our enemy, and it is vital that they remain so.

The President is duty bound to do everything he can to protect the American people. He took an oath to preserve, protect and defend the Constitution. In the wake of 9/11 he told the American people that to carry out this solemn responsibility, he would use every lawful means at his disposal the prevent another attack.

One of those means is the terrorist surveillance program. It is an early warning system designed for the 21st century. It is the modern equivalent to a scout team sent ahead to do reconnaissance or a series of radar outposts designed to detect enemy movements. And as with all wartime operations, speed, agility and secrecy are essential to its success.

While the President approved this program to respond to the new threats against us, he also imposed several important safeguards to protect the privacy and the civil liberties of all Americans.

First. Only international communications are authorized for interception under this program, that is, communications between a foreign country and this country.

Second. The program is triggered only when a career professional at the NSA has reasonable grounds to believe that one of the parties to a communication is a member or agent of al Qaeda or an affiliated terrorist organization. As the President has said, if you are talking with al Qaeda, we want to know what you are saying.

Third. To protect the privacy of Americans still further, the NSA employs safeguards to minimize the unnecessary collection and dissemination of information about U.S. persons.

Fourth. This program is administered by career professionals at NSA. Expert intelligence analysts and their senior supervisors with access to the best available information, they make the decisions to initiate surveillance. The operation of the program is reviewed by NSA lawyers, and rigorous oversight is provided by the NSA Inspector General. I have been personally assured that no other foreign intelligence program in the history of NSA has received a more thorough review.

Fifth. The program expires by its own terms approximately every 45 days. The program may be reauthorized, but only on the recommendation of intelligence professionals, and there must be a determination that al Qaeda continues to pose a continuing threat to America based on the latest intelligence.

Finally, the bipartisan leadership of the House and Senate Intelligence Committees has known about this program for years. The bipartisan leadership of both the House and Senate has also been informed. During the course of these briefings, no members of Congress asked that the program be discontinued.

Mr. Chairman, the terrorist surveillance program is lawful in all respects. As we have thoroughly explained in our written analysis, the President is acting with authority provided both by the Constitution and by statute. First and foremost, the President is consistent with our Constitution. Under Article II, the President has the duty and the authority to protect America from attack. Article II also makes the President, in the words of the Supreme Court, "the sole organ of Government in a field of international relations."

These inherent authorities vested in the President by the Constitution include the power to spy on enemies like al Qaeda without prior approval from other branches of Government. The courts have uniformly upheld this principle in case after case. Fifty-five years ago the Supreme Court explained that the President's inherent constitutional authorities expressly include, "the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns."

More recently, in 2002, the FISA Court of Review explained that, "All the other courts to have decided the issue have held that the President did have inherent authority to conduct warrantless searches to obtain intelligence information." The court went on to add, "We take for granted that the President does have that authority, and assuming that that is so, FISA could not encroach on the President's constitutional powers."

Now, it is significant, this statement, stressing the constitutional limits of the

Foreign Intelligence Surveillance Act, or FISA, came from the very appellate court that Congress established to review the decisions of the FISA Court.

Nor is this just the view of the courts. Presidents, throughout our history, have authorized the warrantless surveillance of the enemy during wartime, and they have done so in ways far more sweeping than the narrowly targeted terrorist surveillance program authorized by President Bush.

General Washington, for example, instructed his army to intercept letters between British operatives, copy them, and then allow those communications to go on their way.

President Lincoln used the warrantless wiretapping of telegraph messages during the Civil War to discern the movements and intentions of opposing troops.

President Wilson, in World War I, authorized the military to intercept each and every cable, telephone and telegraph communication going into or out of the United States.

During World War II, President Roosevelt instructed the Government to use listening devices to learn the plans of spies in the United States. He also gave the military the authority to review, without warrant, all telecommunications, "passing between the United States and any foreign country."

The far more focused terrorist surveillance program fully satisfies the "reasonableness" requirement of the Fourth Amendment.

Now, some argue that the passage of FISA diminished the President's inherent authority to intercept enemy communications even in a time of conflict. Others disagree, contesting whether and to what degree the legislative branch may extinguish core constitutional authorities granted to the Executive branch.

Mr. Chairman, I think that we can all agree that both of the elected branches have important roles to play during a time of war. Even if we assume that the terrorist surveillance program qualifies as electronic surveillance under FISA, it complies fully with the law. This is especially so in light of the principle that statutes should be read to avoid serious constitutional questions, a principle that has no more important application than during wartime. By its plain terms, FISA prohibits the Government from engaging in electronic surveillance "except as authorized by statute." Those words, "except as authorized by statute," are no mere incident of drafting. Instead, they constitute a far-sighted safety valve.

The Congress that passed FISA in 1978 included those words so that future Congresses could address unforeseen challenges. The 1978 Congress afforded future lawmakers the ability to modify or eliminate the need for a FISA application without having to amend or repeal FISA. Congress provided this safety valve because it knew that the only thing certain about foreign threats is that they change in unpredictable ways.

Mr. Chairman, the resolution authorizing the use of military force is exactly the sort of later statutory authorization contemplated by the FISA safety valve. Just as the 1978 Congress anticipated, a new Congress in 2001 found itself facing a radically new reality. In that new environment, Congress did two critical things when it passed the force resolution.

First, Congress recognized the President's inherent constitutional authority to combat al Qaeda. These inherent authorities, as I have explained, include the right to conduct surveillance of foreign enemies operating inside this country.

Second, Congress confirmed and supplemented the President's inherent authority by authorizing him "to use all necessary and appropriate force against al Qaeda."

This is a very broadly worded authorization. It is also one that must permit electronic surveillance of those associated with al Qaeda. Our enemies operate secretly, and they seek to attack us from within. In this new kind of war, it is both necessary and appropriate for us to take all possible steps to locate our enemy and know what they are plotting before they strike.

Now, we all agree that it is a necessary and appropriate use of force to fire bullets and missiles at al Qaeda strongholds. Given this common ground, how can anyone conclude that it is not necessary and appropriate to intercept al Qaeda phone calls? The term "necessary and appropriate force" must allow the President to spy on our enemies, not just shoot at them blindly, hoping we might hit the right target. In fact, other Presidents have used statutes like the force resolution as a basis for authorizing far broader intelligence surveillance programs. President Wilson in World War I cited not just his inherent authority as Commander-in-Chief to intercept all telecommunications coming into and out of this country; he also relied on a congressional resolution authorizing the use of force against Germany that parallels the force resolution against al Qaeda.

A few Members of Congress have suggested that they personally did not intend the force resolution to authorize the electronic surveillance of the enemy, al Qaeda. But we are a Nation governed by written laws, not the unwritten intentions of individuals. What matters is the plain meaning of the statute passed by Congress and signed by the President, and in this case, those plain words could not be clearer. The words contained in the force resolution do not limit the President to employing certain tactics against al Qaeda. Instead, they authorize the use of all necessary and appropriate force. Nor does the force resolution require the President to fight al Qaeda only in foreign countries. The preamble to the force resolution acknowledges the continuing threat "at home and abroad."

Congress passed the force resolution in response to a threat that emerged from within our own borders. Plainly, Congress expected the President to address that threat and to do so with all necessary and appropriate force.

Importantly, the Supreme Court has already interpreted the force resolution in the Hamdi case. There the question was whether the President had the authority to detain an American citizen as an enemy combatant, and to do so despite a specific statute that said that no American citizen could be detained except as provided by Congress. A majority of the Justices in Hamdi concluded that the broad language of the force resolution gave the President the authority to employ the traditional incidents of waging war. Justice O'Connor explained that these traditional powers include the right to detain enemy combatants, and to do so even if they happen to be American citizens.

If the detention of an American citizen who fought with al Qaeda is authorized by the force resolution as an incident of waging war, how can it be that merely listening to al Qaeda phone calls into and out of the country in order to disrupt their plots is not?

Now, some have asked if the President could have obtained the same intelligence using traditional FISA processes. Let me respond by assuring you that we make robust use of FISA in our war efforts. We constantly search for ways to use FISA more effectively. In this debate, however, I have been concerned that some who have asked "Why not FISA?" do not understand how that statute really works.

To be sure, FISA allows the Government to begin electronic surveillance without a court order for up to 72 hours in emergency situations or circumstances. But before that emergency provision can be used, the Attorney General must make a determination that all of the requirements of the FISA statute are met in advance. This requirement can be cumbersome and burdensome. Intelligence officials at NSA first have to assess that they have identified a legitimate target. After that, lawyers at NSA have to review the request to make sure it meets all of the requirements of the statute. And then lawyers at the Justice Department must also review the requests and reach the same judgment or insist on additional information before processing the emergency application. Finally, I as Attorney General must review the request and make the determination that all of the requirements of FISA are met.

But even this is not the end of the story. Each emergency authorization must be followed by a detailed formal application to the FISA Court within 3 days. The Government must prepare legal documents laying out all of the relevant facts and law and obtain the approval of a Cabinet-level officer as well as a certification from a senior official with security responsibility, such as the Director of the FBI. Finally, a judge must review, consider, and approve the application. All of these steps take time. Al Qaeda, however, does not wait.

While FISA is appropriate for general foreign intelligence collection, the President made the determination that FISA is not always sufficient for providing the sort of nimble early-warning system we need against al Qaeda. Just as we cannot demand that our soldiers bring lawyers onto the battlefield, let alone get the permission of the Attorney General or a court before taking action, we cannot afford to impose layers of lawyers on top of career intelligence officers who are striving valiantly to provide a first line of defense by tracking secretive al Qaeda operatives in real time.

Mr. Chairman, the terrorist surveillance program is necessary, it is lawful, and it respects the civil liberties we all cherish. It is well within the mainstream of what courts and prior Presidents have authorized. It is subject to careful constraints, and congressional leaders have been briefed on the details of its operation. To end the program now would be to afford our enemy dangerous and potentially deadly new room for operation within our own borders.

I have highlighted the legal authority for the terrorist surveillance program, and I look forward to our discussion and know that you appreciate there remain serious constraints on what I can say about operational details. Our enemy is listening, and I cannot help but wonder if they are not shaking their heads in amazement at the thought that anyone would imperil such a sensitive program by leaking its existence in the first place, and smiling at the prospect that we might now disclose even more or perhaps even unilaterally disarm ourselves of a key tool in the war on terror.

Thank you, Mr. Chairman.

Chairman Specter. Thank you very much, Attorney General Gonzales.

Before proceeding to the 10-minute rounds for each of the Senators, let me request that you make your answers as brief as possible. You are an experienced witness, and we will try to make our questions as pointed and as brief as each Senator sees it appropriate.

Senator Leahy. Mr. Chairman, could I also ask that we have for the record the statement that the Attorney General--well, obviously the statement that he just gave now, but the statement that he submitted to the Committee under our rules a couple days ago as part of the record.

Chairman Specter. Is there a difference between the two statements, Mr. Attorney General?

Attorney General Gonzales. Sir, there is a difference between the written statement and the oral statement, yes, sir.

Chairman Specter. The same?

Attorney General Gonzales. There is a difference, sir. They are not the same.

Chairman Specter. Well, both will be made a part of the record.

All right. Now for the 10-minute rounds. Mr. Attorney General, starting with the FISA Court, well-respected, maintains secrecy, experienced in the field, and I posed this question to you in my letter: Why not take your entire program to the FISA Court within the broad parameters of what is reasonable and constitutional and ask the FISA Court to approve it or disapprove it?

Attorney General Gonzales. Senator, I totally agree with you that the FISA Court should be commended for its great service. They are working on weekends, they are working at nights--

Chairman Specter. Now on to my question.

Attorney General Gonzales. They are assisting us in the war on terror. In terms of when I go to the FISA Court, once the determination was made that neither the Constitution nor FISA prohibited the use of this tool, then the question becomes for the Commander-in-Chief which of the tools is appropriate given a particular circumstance. And we studied very carefully the requirements of the Constitution under the Fourth Amendment. We studied very carefully what FISA provides for.

As I said in my statement, we believe that FISA does anticipate that another statute could permit electronic surveillance and--

Chairman Specter. Okay. You think you are right, but there are a lot of people who think you are wrong. As a matter of public confidence, why not take it to the FISA Court? What do you have to lose if you are right?

Attorney General Gonzales. What I can say, Senator, is that we are continually looking at ways that we can work with the FISA Court in being more efficient and more effective in fighting the war on terror. Obviously, we would consider and are always considering methods of fighting the war effectively against al Qaeda.

Chairman Specter. Well, speaking for myself, I would urge the President to take this matter to the FISA Court. They are experts. They will maintain the secrecy. And let's see what they have to say.

Mr. Attorney General, did Judge Robertson of the FISA Court resign in protest because of this program?

Attorney General Gonzales. I do not know why Judge Robertson resigned, sir.

Chairman Specter. Has the FISA Court declined to consider any information obtained from this program when considering warrants?

Attorney General Gonzales. Sir, what I can say is that the sources of information provided or included in our application are advised or disclosed to the FISA Court because obviously one of the things they have to do is judge the reliability.

Chairman Specter. So if you have information that you are submitting to the FISA Court in support for a warrant you tell them that it was obtained from this program?

Attorney General Gonzales. Senator, I am uncomfortable talking about how this--in great detail about how this information is generally shared. What I can say is just repeat what I just said, and that is, we as a matter of routine provide to the FISA Court information about the sources of the information that form the basis of an application--

Chairman Specter. I am not asking you how you get the information from the program. I am asking you, Do you tell the FISA Court that you got it from the program? I want to know if they are declining to issue warrants because they are dissatisfied with the program.

Attorney General Gonzales. Senator, I am not--I believe that getting into those kind of details is getting into the detail about how the program is operated. Obviously, the members of the court understand the existence of this program. What I can say is we have a very open and very candid discussion and relationship with the FISA Court. To the extent that we are involved in intelligence activities that relate in any way to the FISA Court and they have questions about that, we have discussions with the FISA Court.

Our relationship with the court is extremely important, and we do everything that we can do to assure them with respect to our intelligence activities that affect decisions that they make.

Chairman Specter. I am not going to press you further, but I would ask you to reconsider your answer.

Attorney General Gonzales. Yes, sir.

Chairman Specter. In your response to my letter, you said this: "No communications are intercepted unless it is determined that"--and then I am leaving some material out--"a party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization." You are representing to this Committee that before there is an interception, there is a determination that one of the parties is a member of al Qaeda, an agent of al Qaeda, or an affiliated terrorist organization. Is that true?

Attorney General Gonzales. Sir, I believe General Hayden, the Deputy Director of Intelligence, yesterday confirmed that before there is any interception, there is a determination made by an intelligence officer at NSA that, in fact, we have reasonable grounds to believe that one party in the communication is a member or agent of al Qaeda or an affiliate terrorist organization.

Chairman Specter. Is there any way you can give us assurance that it is true without disclosing the methods and sources of your program? It seems to me that that is a very important statement, and if we were really sure that you are dealing only with a communication where you have a member of al Qaeda, an agent of al Qaeda, or an affiliated with al Qaeda terrorist organization, it would be one thing, because the concern is that there is a broad sweep which includes people who have no connection with al Qaeda. What assurances can you give to this Committee and beyond this Committee to millions of Americans who are vitally interested in this issue and following these proceedings?

Attorney General Gonzales. Well, I would say, Senator, and to the American people and to this Committee, that the program as operated is a very narrowly tailored program, and we do have a great number of checks in place to ensure, I am told by the operations folks, a great degree of certainty, a high degree of confidence that these calls are solely international calls. We have these career professionals out at NSA who are experts in al Qaeda tactics, al Qaeda communications, al Qaeda aims. They are the best at what they do, and they are the ones that make the judgment as to whether or not someone is on a call that is a member of al Qaeda or a member of an affiliate organization.

The Inspector General, as I have indicated, has been involved in this program from its early stages. There are monthly--

Chairman Specter. Mr. Attorney General, let me interrupt you because I want to cover a couple more questions and time is fleeting. I think you have given the substance of the response.

We have contacted former Attorney General Ashcroft about his availability to testify before this Committee, and he has not said yes and he has not said no. He is considering it. I believe that the testimony of former Attorney General Ashcroft would fall under a little different line than line attorneys within the Department who are giving information and the concern about having a chilling effect if they know their views are later to be determined.

I think the Attorney General is different, and my question to you is: Would you have any objection to former Attorney General Ashcroft's appearance before this Committee on this issue?

Attorney General Gonzales. I would not, Senator, although, of course, if it relates to questions regarding the law and the position of the executive branch, that is what I am doing today, is conveying to this Committee what is the executive branch position on the legal authorities of the President in authorizing the terrorist surveillance program.

Chairman Specter. That is all we would ask him about. We wouldn't ask him about the operations. I take it, if I heard you correctly, you would not have an objection.

Attorney General Gonzales. Senator, this Committee, of course, can ask who they want to ask come before the Committee.

Chairman Specter. I know we can ask. A totally different question as to what we hear in response. He has not told us that he is going to look to the Department of Justice. But I think he would feel more comfortable knowing that you had no objection. I thought I heard you say earlier that you didn't have an objection.

Attorney General Gonzales. Senator, I don't think I would have an objection.

Chairman Specter. Okay. Two more questions, which I want to ask before my red light goes on.

On looking at congressional intent as to whether the resolution authorizing the use of force, whether Congress intended for that generalized resolution to carry an authorization for this electronic surveillance in distinction to the Foreign Intelligence Surveillance Act, you were quoted as saying, "That was not something that we could likely get." Now, that is different from the response you had that it might involve disclosures. But I will limit it to just this one question.

If this is something you could not likely get, then how can you say Congress intended to give you this authority? Let the record show my red light went on with the conclusion of the statement.

Attorney General Gonzales. Senator, in that same press conference, I clarified that statement, and I think, the next press conference I was at with Mike Chertoff, I clarified that statement. That is, the consensus was in a meeting that legislation could not be obtained without compromising the program, i.e., disclosing the existence of the program, how it operated, and thereby effectively killing the program.

Chairman Specter. Thank you very much.

Senator Leahy?

Senator Leahy. Mr. Chairman, you have raised some interesting points, and in listening to the Attorney General, who is now arguing that the President's wiretapping in Americans without a warrant is legal, it does not violate the controlling law, the Foreign Intelligence Surveillance Act. They have given a fancy name to the President's surveillance, but I would remind him that the terrorist surveillance program is the FISA law which we passed. I think you are violating express provisions of that Act.

Let me just ask you a few questions that can be easily answered yes or no. I am not asking about operational details. I am trying to understand when the administration came to the conclusion that the congressional resolution authorizing the military force against al Qaeda, where we had hoped that we would actually catch Osama bin Laden, the man who hit us, but when you came to the conclusion that it authorized warrantless wiretapping of Americans inside the United States. Did you reach that conclusion before the Senate passed the resolution on September 14, 2001?

Attorney General Gonzales. Senator, what I can say is that the program was initiated subsequent to the authorization to use military force--

Senator Leahy. Well, then let me--

Attorney General Gonzales. --and our legal analysis was completed prior to the authorization of that program.

Senator Leahy. So your answer is you did not come to that conclusion before the Senate passed the resolution on September 14, 2001.

Attorney General Gonzales. Senator, I certainly had not come to that conclusion. There may be others in the administration who did.

Senator Leahy. Were you aware of anybody in the administration that came to that conclusion before September 14, 2001?

Attorney General Gonzales. Senator, sitting here right now, I don't have any knowledge of that.

Senator Leahy. Were you aware of anybody coming to that conclusion before the President signed the resolution on September 18, 2001?

Attorney General Gonzales. No, Senator. The only thing that I can recall is that we had just been attacked and that we had been attacked by an enemy from within our own borders and that--

Senator Leahy. Attorney General, I understand. I was here when that attack happened, and I joined with Republicans and Democrats and virtually every Member of this Congress to try to give you the tools that you said you needed for us to go after al Qaeda, and especially to go after Osama bin Laden, the man that we all understood masterminded the attack and the man who is still at large.

Now, back to my question. Did you come to the conclusion that you had to have this warrantless wiretapping of Americans inside the United States to protect us before the President signed the resolution on September 18, 2001. You were the White House Counsel at the time.

Attorney General Gonzales. What I can say is that we came to a conclusion that the President had the authority to authorize this kind of activity before he actually authorized the activity.

Senator Leahy. When was that?

Attorney General Gonzales. It was subsequent to the authorization to use military force.

Senator Leahy. When?

Attorney General Gonzales. Sir, it was just a short period of time after the authorization to use military force.

Senator Leahy. Was it before or after NSA began its surveillance program?

Attorney General Gonzales. Again, the NSA did not commence the activities under the terrorist surveillance program before the President gave his authorization, and before the President gave the authorization, he was advised by lawyers within the administration that he had the legal authority to authorize this kind of surveillance of the enemy.

Senator Leahy. So NSA didn't do this until the President gave them the green light that they could authorize warrantless wiretapping of Americans inside the United States under the circumstances you described in your earlier testimony?

Attorney General Gonzales. Of course, Senator, the NSA has other authorities to engage in electronic surveillance--

Senator Leahy. I understand that.

Attorney General Gonzales. --and I am told that they--

Senator Leahy. I am talking about this specific program.

Attorney General Gonzales. And I am told they took advantage of those authorities, but it is my understanding--and I believe this to be true--that the NSA did not commence the kind of electronic surveillance which I am discussing here today prior to the

President's authorization.

Senator Leahy. The President has said publicly that he gave about 30 of these authorizations, having held off for a period of time, I think, when the administration heard the New York Times was looking into it. But you were White House Counsel. Did the President give his first authorization before or after Attorney General Ashcroft met with us and gave us the proposals from the administration which ultimately went into the USA PATRIOT Act?

Attorney General Gonzales. Sir, I don't know. I don't know when he gave you those proposals.

Senator Leahy. Well, we enacted the USA PATRIOT Act in October 2001, and you were there at the signing ceremony. We used the--we tried to encompass those things that the administration said they needed. Was the first one of the President's authorizations done before he signed the USA PATRIOT Act?

Attorney General Gonzales. Sir, I would have to go back and check. I don't know.

Senator Leahy. Okay. You are going to be back here this afternoon. Please check because I will ask you this question again, and you will have a chance to ask--I am looking around the room. You have an awful lot of staff here. Let's have that answer. You were there when he signed the Act. Let us know when his first authorization was, whether it was before or after he signed that Act.

Now--

Attorney General Gonzales. Sir, may I make a statement? We believe the authorization to use military force constituted a statutory grant of authority to engage in this kind of surveillance, and, therefore, it wouldn't be necessary to seek an amendment to FISA through the PATRIOT Act.

Senator Leahy. Okay. My question still remains, and like Senator Specter, I am trying to ask basically things you could answer yes or no. You talk about the authorization for use of military force. We have a chart up over there that says that, "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

Now, basically what you are saying is that Congress must have understood to have authorized the President to do it, not that we actually did but that we must have understood it.

Now, this authorization is not a wiretap statute. I was a prosecutor. Senator Specter was a prosecutor. A lot of other prosecutors are here. We know what a wiretap statute looks like. This is not it.

So let me ask this: Under that logic, is there anything to stop you from wiretapping without a warrant somebody inside the United States that you suspect of having al Qaeda connections?

Attorney General Gonzales. Clearly, Senator, that is not what is going on here, first of all. The President has authorized a much more narrow program. We are always, of course, subject to the Fourth Amendment, so the activities of any kind of surveillance within the United States would, of course, be subject to the Fourth Amendment.

Senator Leahy. Well, Mr. Attorney General, we are getting the impression that this administration is kind of picking and choosing what they are subject to, can you show us in the authorization for use of military force, what is the specific language you say is authorized in wiretapping of Americans without a warrant?

Attorney General Gonzales. Sir, there is no specific language, but neither is there specific language to detain American citizens, and the Supreme Court said that the words "all necessary and appropriate force" means all activities fundamentally incident in waging war.

Senator Leahy. But there was not a law--they did not have a law specifically on this.

Attorney General Gonzales. Sure they did, sir.

Senator Leahy. If you use the Jackson test, they have a law on wiretapping. It is called FISA. It is called FISA. And if you do not like that law, if that law does not work, why not just ask us?

Attorney General Gonzales. Sir, there was a law at question in Hamdi. It was 18 USC 4001(a), and that is, you cannot detain an American citizen except as authorized by Congress. And Hamdi came into the Court saying the authorization to use military force is not such a permission by Congress to detain an American citizen, and the Supreme Court, Justice O'Connor said, even though the words were not included in the authorization, Justice O'Connor said Congress clearly and unmistakably authorized the President to detain an American citizen, and detention is far more intrusive than electronic surveillance.

Senator Leahy. Let me ask you this: under your interpretation of this, can you go in and do mail searches? Can you go into e-mails? Can you open mail? Can you do black-bag jobs? And under the idea that you do not have much time to go through what you describe as a cumbersome procedure, but most people think it is a pretty easy procedure, to get a FISA warrant, can you go and do that, of Americans?

Attorney General Gonzales. Sir, I have tried to outline for you and the Committee what the President has authorized, and that is all that he has authorized.

Senator Leahy. Did it authorize the opening of first-class mail of U.S. citizens? That you can answer yes or no.

Attorney General Gonzales. There is all kinds of wild speculation about what the--

Senator Leahy. Did it authorize it?

Chairman Specter. Let him finish.

Attorney General Gonzales. There is all kinds of wild speculation out there about what the President has authorized, and what we are actually doing. And I am not going to get into a discussion, Senator, about--

Senator Leahy. Mr. Attorney General, you are not answering my question. I am not asking you what the President authorized. Does this law--you are the chief law enforcement officer of the country--does this law authorize the opening of first-class mail of U.S. citizens? Yes or no, under your interpretation?

Attorney General Gonzales. Senator, I think that, again, that is now what is going on here. We are only focused on communications, international communications, where one part of the communication is al Qaeda. That is what this program is all about.

Senator Leahy. You have not answered my question.

Well, Mr. Chairman, I will come back to this, and the Attorney General understands there are some dates he is going to check during the break, and I will go back to him.

Chairman Specter. Thank you, Senator Leahy.

Senator Hatch.

Senator Hatch. This is a very interesting set of issues, and a lot of constitutional issues, for people who are watching this. We have got, in addition to all kinds of constitutional issues about interpreting statutes, you have got the canon of constitutional avoidance here, that is a very important rule in constitutional law. You have got the Vesting

Clause, vesting power in the President. You have got inherent Executive authority that people seem to just brush aside here. They will talk in terms of, well, Congress is coequal with the President, but they do not ever really talk in terms of the President being coequal with the Congress, or to pass laws, you have got the various canons of statutory interpretation. All of these are here, and it makes this a very interesting thing.

But let me just ask you some specific questions here. It is my understanding, as I have reviewed this, and as I have looked at a lot of the cases, that virtually all of the Federal Courts of Appeal that have addressed the issue, have affirmed the President's inherent constitutional authority to collect foreign intelligence without a warrant. Is that a fair statement?

Attorney General Gonzales. It is a fair statement, Senator, that all of the Court of Appeals that have reviewed this issue have concluded that the President of the United States has the authority, under the Constitution, to engage in warrantless searches consistent with the Fourth Amendment for purposes of gathering foreign intelligence.

Senator Hatch. That is what the Katz v. U.S. case seemed to say, is it not, that wiretapping to protect the security of the Nation has been authorized by successive Presidents; is that correct?

Attorney General Gonzales. It is certainly the case that successive Presidents, particularly during a time of war, have authorized warrantless searches.

Senator Hatch. And you are relying on the Hamdi case as well, where a majority of the Court basically authorized the President exceptional powers under the Authorized Use of Military Force Statute?

Attorney General Gonzales. I would not say they are exceptional powers. I think that they are traditional powers of the President under a time of war.

Senator Hatch. Then U.S. v. Truong. That was a 1983 case.

Attorney General Gonzales. Yes. Once again, the Court finding that the President of the United States does have the inherent authority to engage in warrantless searches, consistent with the Fourth Amendment, for purposes of gathering foreign intelligence.

Senator Hatch. That was the case after the enactment of the FISA law, right?

Attorney General Gonzales. It was a case after the enactment of FISA, but I think to be fair, I do not think the Court did a rigorous analysis about how FISA affects the analysis, but there was a decision by the Court that the President had the inherent authority.

Senator Hatch. That is the important part of the case, as far as I am concerned. U.S. v. Butenko. It is a 1974 case, before FISA. U.S. v. Brown, U.S. v. U.S. District Court, and the so-called Keith case.

Attorney General Gonzales. The Keith case was where the Court, for the first time, said that electronic surveillance, it would be subject--electronic surveillance for domestic security purposes is subject to the Fourth Amendment.

Senator Hatch. Haig v. Agee, that is a 1981 case, again, after FISA, that matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention. That is a recognition that the President has to make some decisions, right?

Attorney General Gonzales. Right. If I could just follow up, Senator. My statement on the Keith case where the Court did say that electronic surveillance for purposes of domestic security would be subject to warrant requirements under the Fourth Amendment. The Court expressly made clear that they were not talking about electronic surveillance for foreign intelligence purposes. They were only talking about electronic surveillance for domestic security purposes.

Senator Hatch. What about The Prize Cases, they are very well-known cases, and culminating in the case that quotes The Prize Cases in Campbell v. Clinton.

Attorney General Gonzales. Again, there are a number of cases that recognizes the President's inherent constitutional authority, particularly in a time of war--

Senator Hatch. And the President's independent authority; is that correct? That is what Campbell v. Clinton says.

Attorney General Gonzales. To engage in surveillance in order to protect our country.

Senator Hatch. In fact, there is a 2002 case, In re: Sealed Cases, right?

Attorney General Gonzales. In re: Sealed Cases, I said in my statement is--

Senator Hatch. I mean that is a case decided by the FISA Court of Review, the actual FISA Court, right?

Attorney General Gonzales. The FISA Court of Review was created by Congress to review the decisions by the FISA Court. In that decision, in that case, the FISA Court of Review acknowledged that these cases by other Circuit Courts, that the President does have the inherent authority, and the FISA Court of Review said, assuming that to be true, that FISA could not encroach upon the powers of the President.

Senator Hatch. They could not encroach on the President's constitutional powers.

Attorney General Gonzales. That is correct.

Senator Hatch. So people who are wildly saying that the President is violating the law are ignoring all of these cases that say that--at least imply--that he has the inherent power to be able to do what he should to protect our Nation during a time of war?

Attorney General Gonzales. And I want to emphasize, Senator, this is not a case where we are saying FISA--we are overriding FISA or ignoring FISA. Quite the contrary. We are interpreting the authorization to use military force as a statutory grant--

Senator Hatch. You use FISA all the time, don't you?

Attorney General Gonzales. FISA is an extremely important tool in fighting the war on terror. I know today there is going to be some discussion about whether or not we should amend FISA. I do not know that FISA needs to be amended, per se, because when you think about it, FISA covers much more than international surveillance. It exists even in the peacetime. And so when you are talking about domestic surveillance during peacetime, I think the procedures of FISA, quite frankly, are quite reasonable, and so that is one of the dangers of trying to seek an amendment to FISA, is that there are certain parts of FISA that I think provide good protections. And to make an amendment to FISA in order to allow the activities that the President has authorized, I am concerned will jeopardize this program.

Senator Hatch. It may even encroach on the inherent powers of the President, right?

Attorney General Gonzales. Yes, sir.

Senator Hatch. Let me just say this to you: as I view your arguments, we are faced with a war unlike any other war we have ever been in. We are faced with a war of international terrorists. That is one reason we did the PATRIOT Act was to bring our domestic criminal laws up--excuse me--our international antiterrorism laws up to the equivalent of domestic criminal laws. And you are saying that--and I have to say I find some solace in this--you are saying that when Congress, through a joint resolution, authorized the use of military force, gave the President these wide powers that are much wider than the ordinary single sentence declaration of war up through World War II, which was the last one if I recall it correctly, that that statute allowed you, coupled with inherent powers of the President, to be able to go after these terrorists before they hit us again?

Attorney General Gonzales. This is an example of Congress exercising its Article I powers to pass legislation, so the President, in exercising his inherent authorities under Article II, has all the authority that he needs to fight al Qaeda.

Senator Hatch. The Authorized Use of Military Force Resolution, which was a joint resolution of both houses of Congress, declared that the Nation faces, "an unusual and extraordinary threat," and acknowledges that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States and provides that the President is authorized "to use all necessary and appropriate force" against those he determines are linked to the September 11th attacks.

That sweeping language goes a lot further than the usual single sentence declaration of war, right?

Attorney General Gonzales. It is a very broad authorization which makes sense. I do not think anyone in those days and weeks, certainly not in the Congress, were thinking about cataloguing all of those authorities that they wanted to give to the President. I think everyone expected the President of the United States to do everything he could to protect our country, and the Supreme Court has said that those words, "all necessary and appropriate force" means that the Congress has given to the President of the United States the authority to engage in all the activities that are fundamental and incident to waging war.

Senator Hatch. So you are relying on an act of Congress, a joint resolution. You are relying on the inherent powers of the President to protect our borders and to protect us, and you are relying on the Fourth Amendment which allows reasonable searches and seizures in the best interest of the American public; is that a fair analysis?

Attorney General Gonzales. That is a fair analysis, yes, sir.

Senator Hatch. My time is up, Mr. Chairman.

Chairman Specter. Thank you, Senator Hatch.

Senator Kennedy?

Senator Kennedy. Thank you, Mr. Chairman. I think the final comments about all of us desiring to protect our country is something which is common. We certainly respect your strong dedication and commitment to that, Attorney General.

Attorney General Gonzales. Thank you, Senator.

Senator Kennedy. I think all of us remember the time of 9/11. I certainly do, being actually with Mrs. Bush just before her testimony on an education hearing. It is a moment that is emblazoned in all our minds.

I want to approach this in a somewhat different way in the questioning. I am very concerned about the whole issue in question if you are not right legally. Now, you make a very strong case in your presentation here about the authority which you are acting on. You talk about the authorization by the Congress. You talk about inherent power. You talk about the President having the authority and the power to do this. But there is, of course, a very significant legal opinion to the contrary. There was within your Department, very important, thoughtful lawyers that were in the Department of Justice who questioned it, constitutional authorities that have questioned it.

So we are taking really a risk with national security, which I think is unwise. We are sending the wrong message to those that are in the front lines of the NSA, that maybe someday they may actually be prosecuted, criminally or civilly. We are sending a message to the courts, that perhaps the materials that we are going to take, let me just say, from eavesdropping or signal intelligence, may not be used in the courts, again, prosecuting al Qaeda, people we really want to go after because it was not done legally. We are sending a message to the telephone companies that they may be under assault and attack as well.

There are already cases now brought by individuals against the telephone companies. So that we have to get it right, because if we do not get it right, we are going to find that we have paid a very harsh price on it. Some of those toughest, meanest and cruelest members of al Qaeda may be able to use illegality in the court system to escape justice, maybe or maybe not. But why take a change?

We were facing the issue of electronic surveillance at another time, in 1976, when we had the Attorney General Ed Levi and President Ford. They followed a much different course than you have followed. Ed Levi came and consulted with us. Members of this Committee went down and visited the Justice Department on four different times. The memoranda that we have from that period of time point out the Buchen memoranda which are part of the record, the concerns that the Attorney General had about getting it right in terms of electronic surveillance, uncertainty in courts, validity of evidence, cooperation of the phone companies. And in a series of memoranda that go to the President of the United States and discussions that were actually held with Henry Kissinger, Don Rumsfeld, Ed Levi, Brent Scowcroft, George Bush, lengthy discussions with others, finally, the Attorney General said the main concern was whether this legislative initiative would succeed or whether, as some feared, the legislation which is actually passed would depart in objectionable ways, so that they were not sure about what Congress would do. But they dealt with the Congress and they got FISA.

Later goes on to say, already the Attorney General has found key members of the Senate Judiciary receptive to the legislation. And then finally, "the Attorney General is strongly of the opinion that you," the President, "should support the legislation as drafted. If you feel any hesitancy, I'll come by and brief you."

This is what we had 27 years ago: an Attorney General that came up to the Judiciary Committee, had them come down and work out FISA, and it passed with one dissenting vote in the United States Senate. It might not have gotten it right, but certainly for that period of time, that it got it right.

The question that I have for you is, why did you not follow that kind of pathway which was so successful at a different time? We had a Republican President, Republican Attorney General. We are talking about electronic surveillance. And as you know from the FISA, there are very sensitive provisions that were included in there that were directed against foreign nationals that this Committee was able to deal with, and do it in a responsible way. Why didn't you follow that pattern?

Attorney General Gonzales. Sir, the short answer is, is that we did not think we needed to, quite frankly. I have tried to make clear today that we looked at this issue carefully, decided that neither the Constitution nor FISA, which contemplated a new statute, would prohibit this kind of activity from going forward.

I might also say this is a little different time from what existed in 1976. Of course, we are at war, and we have briefed certain members of Congress. So it is not entirely true that we did not reach out to the Congress and talk--certain members of the Congress and talk to them about this program and about what we were doing.

Senator Kennedy. The point I would say, we were facing a nuclear threat. We have got terrorism now, but it was a nuclear threat then. The Cold War was in full flow at that time. It was nuclear threat at that time.

And you know what Attorney General Levi did? He took a day and a half to have outside constitutional authorities to come down and advise him on the questions of the constitutionality of the legislation, a day and a half. Now, did you talk to any outside authorities--not inside authorities that are going to give you, quite frankly, probably what you want to hear--but did you check any--the reason I question on this, General, is because we have been through the Bybee memorandum, we have been through torture amendments, where you and the OLC and the White House Counsel thought that those--not amendments, memoranda--but that the Bybee memoranda was just fine. Then we find out, during the course of your hearings, that it was not fine, and it was effectively repealed, a year and a half after it was in effect.

So it is against that kind of background about certainty, about your view about its legality, and in-house review of the legality. Some of us would have wondered did you take the steps that an Ed Levi, Republican Attorney General, on the same subject, was willing to do, to listen to outside constitutional authority, because as we have seen subsequently, you have had difficulty in your own Department and you have had substantial difficulty with constitutional authorities and others that might not believe that you are correct. If it is correct, we do not have a problem. If you are not correct, then it is a step back in terms of national security.

My question to you is, looking at the national security issue, would we not be in a stronger position if you had come to the Congress and say, "Let's get the kind of legislative authority that we need, rather than take a chance." Wouldn't our national security been better defended if we did not have any question as to the legality of this issue? Wouldn't the people in the front lines of our national security be better protected, and our court system better defended? And when we are able to get those al Qaeda individuals, and they know they do not have any loopholes by appealing illegal eavesdropping, maybe then they would begin to talk and try to make a deal. Maybe then that enhances our national security as well.

Attorney General Gonzales. Well, sir, you have said a lot, so I do not know--

Senator Kennedy. Yes, it is short time.

Attorney General Gonzales. Let me just say you are absolutely right, we have got to have a very clear message, and we cannot be wrong on this. I do not think that we are wrong on this. Are we worried about the front line people down at NSA? Of course we are. That is why the President, the day after the story ran in the New York Times, went out to the American people to reassure them this was not a situation where you had an agency running amuck, that he had authorized this activity, and it was very narrowly tailored.

In terms of whether or not, are we concerned about activities that may jeopardize investigations or prosecutions? Absolutely, we are. That is the last thing we want to do. We do not believe this program is--we believe this program is lawful. We do not believe that prosecutions are going to be jeopardized as a result of this program. Obviously, we are in litigation now, so I do not want to say much more than that, but, of course, we ought to be operating in a way where we are doing what we need to do to protect our investigations and to protect our prosecutions, and I think that we are doing that.

Senator Kennedy. My time is just about up. Thank you very much, General.

Chairman Specter. Thank you very much, Senator Kennedy.

I want to acknowledge the presence in the audience of Ms. Deborah Burlingame, who is the sister of Captain Charles F. Burlingame, the pilot on American Airlines Flight 77, which crashed into the Pentagon.

Attorney General Gonzales, would you like a break?

Attorney General Gonzales. If you are offering a break, Mr. Chairman, yes.

Chairman Specter. Well, I am not going to offer you one unless you want one.

[Laughter.]

Attorney General Gonzales. I am fine, sir. I will defer to you, Mr. Chairman.

Senator Leahy. Take the break.

Attorney General Gonzales. I will take a break.

Chairman Specter. Let's take a vote here.

[Laughter.]

Chairman Specter. Ten-minute break.

[Recess from 11:06 a.m. to 11:14 a.m.]

Chairman Specter. Before proceeding, I would like to acknowledge the presence of Ms. Monica Gabrielle and Ms. Mindy Kleinberg, family members, husbands in the World Trade Center at the time of the 9/11 attack.

Mr. Attorney General, thank you for rejoining us, and we turn now to Senator Grassley.

Senator Grassley. Thank you very much.

I am going to start with something that is just peripheral to the issues we are on, but it does deal with our national security, and it is the leak of this information to New York Times. I am greatly concerned about this, and these leaks could be putting our Nation's safety into serious jeopardy. Could you tell us what is being done to investigate who leaked this national security information, and whether the Department of Justice will initiate a prosecution of an individual leaking the information?

Attorney General Gonzales. Senator, we have confirmed--the Department has initiated an investigation into possible crimes here, and consistent with Department practice, I am not going to talk much further about an ongoing investigation. Obviously, we have to look at the evidence and if the evidence shows that a crime has been committed, then, obviously, we will have to make decision about moving forward with a prosecution.

Senator Grassley. I do not blame you for this, but I do not hear as much about public outcry about this leak as I did about Valerie Plame and the White House disclosures of her--presumed disclosures of her identity of a CIA agent, and to me, that is a two-bit nothing compared to this sort of issue that we have before us or this information being leaked to the press.

In the follow-up commentaries, reading the newspapers and TV, you get the impression that this is some sort of an LBJ-J. Edgar Hoover operation that is designed to skirt the law to spy on domestic enemies. And I think you are making very clear the opposite, that this is only concerned about the national security of the United States, and that is where the focus should be.

The constant repetition on the news media of the term "domestic spying," as opposed to spying and electronic surveillance of somebody outside the United States connected with an organization that has as their goal the killing of Americans, or the threatening of America, or the destruction that happened on September the 11th is entirely two different things, but when domestic spying is often used, you can understand, General, the people having outrage maybe at what is going on.

Also, for my colleagues on this Committee, it seems to me that if we are doing our job right, we have got some problems. Because let's just say the Attorney General is wrong in the statutory and constitutional authority by which they proceeded to do what they are doing. And yet, members of Congress were told about this program over a period of four years, a few members of Congress were, the appropriate ones were. Then all of a sudden it hits the New York Times, and all of a sudden, then that story breaks, congressmen change their tune from the one sung in private for four years, to outrage that this is going on.

So if Senator Grassley, who is not a member of that elite group that has to be concerned about oversight of foreign intelligence knows about it, and does not tell--if I were a member and did not tell my colleagues about it, and then express that outrage, where have I been as a member of that group for the last four years? If something is wrong after the New York Times reported it, there had to be something wrong before the New York Times reported it. All of a sudden I see members of Congress who had that responsibility, if they really, sincerely think it is wrong today, that were caught not doing their job of congressional oversight as they should have, informing the other members of Congress that there is really something wrong that the President is doing here.

So I think we in Congress have to do some looking internal looking of whether or not we are doing our job as well of oversight.

I always to want to remind people in the United States that what we are talking about here today is to make sure that September the 11th does not happen again, and somehow we tend to have short memories. We ought to remember that it happened in Madrid, it happened in London, it happened in Amman, it happened in a resort in Egypt, it happened in Bali twice, and it has happened here. It can happen again. It seems to me that what you are trying to tell us is the President is determined to make sure that it does not happen in the United States again, and that is what this surveillance is all about. Yes?

Attorney General Gonzales. Senator, he is absolutely determined to do everything that he can, under the Constitution and the laws of this country, to prevent another September 11th from happening again.

Senator Grassley. And I think you are telling us that in the case of people giving some information, that it is very necessary to act with dispatch, that acting with dispatch or not can be a matter of life or death for Americans.

Attorney General Gonzales. Absolutely. If we get information that may lead us to other information about a terrorist operating in this country, we may not have a matter of days or weeks or months, which is sometimes the case with respect to a FISA application, but we may not have that much time to begin surveillance. And if we wait--and again, FISA has been a wonderful tool and has been very effective in the war on terror. But there are certain circumstances where the requirements of FISA present challenges, and if we wait, we may lose valuable information that may help us, it may help us get information that might prevent another attack.

Senator Grassley. I had an opportunity to speak to you on the phone recently, and I asked you to come ready to give us some specific instances of when past Presidents have ordered warrantless intelligence surveillance in the prosecution of a war or to otherwise fulfill the Commander-in-Chief's duties. I think that as the American public hears examples of how Democrat Presidents and Republican Presidents alike have done similar things, they may begin to see that this program, in a different light, particularly in regard to the Presidents' over 225 years use of the exercise of the power of Commander-in-Chief.

Attorney General Gonzales. I gave in my opening statement, Senator, examples where President Washington, President Lincoln, President Wilson, President Roosevelt, have all authorized electronic surveillance of the enemy on a far broader scale, without any kind of probable cause standard, all communications in and out of the country. So, for example, President Wilson, World War I, he relied upon his constitutional authority, inherent constitutional authority, and a use of force resolution, declaration of war, very consistent with what we are dealing with today.

Senator Grassley. And December the 8th, '41, the day after Pearl Harbor, FDR ordered the FBI to intercept any communications between our country and any other country, whether it be by mail or any other source.

Attorney General Gonzales. President Roosevelt did authorize very broad surveillance of the enemy.

Senator Grassley. It is well established that the President has a number of inherent constitutional powers. Today's hearing and the two that will follow will give the Senate an opportunity to analyze the President's case on constitutionality. When Moussaoui was arrested, the FBI could not look at his computer files and telephone contacts. That has been changed so you can have that sort of communication now. Could you tell us in the Department of Justice white paper entitled Legal Authority Supporting the Activities of a President doing this, the administration argued that "The President's power to authorize the NSA activities is at its zenith," citing Justice Jackson's concurrence in the Sawyer case. I guess you would call it the Youngstown case.

Would you, please, discuss the framework set by Justice Jackson for determining how much deference a President should be given, including why the administration believes that its power in this regard is at its zenith?

Attorney General Gonzales. Yes, sir. I will try to in the time remaining. Justice Jackson--

Senator Grassley. All I have to do is finish my question before the time is up.

Attorney General Gonzales. Pardon me, Senator. Justice Jackson laid out a three-part test in terms of determining presidential power. The first part is where the President is exercising his authority with the concurrence and essence of Congress. We believe that is what is occurring here. We believe the authorization to use military force is such a concurrence by Congress for the President to engage in this kind of activity, and therefore, we believe the President's power is at its zenith in this first category.

The second category is where the President is exercising his constitutional authority in the absence of any congressional action. And there Justice Jackson talked about being sort in the zone of twilight and trying to ascertain where the limits are between presidential authority and congressional authority. That is not the case here.

The third part was where the President is acting in contravention--not in contravention, but in a way that is incompatible with congressional action. In that particular case, you looked at the President's constitutional authority minus whatever constitutional congressional authority Congress has.

So the question is in which category we are in. We believe we are in the first category, that the Congress has, through the authorization of using military force, provided its support for presidential action.

If in fact that is not the case, then we are in the third category, and I submit, Senator, that this case is very different from Youngstown, where we talked about the President of the United States taking over domestic industry. We are talking here about a core constitutional action by the President, long history of Presidents engaging in electronic surveillance of the enemy. So this is a much different situation.

My judgment is, while these are always very hard cases, and there is very little precedent in this matter, I believe that even under the third part, that the President does have the constitutional authority. I will just remind the Committee that Chairman Roberts just recently submitted a letter to the Committee, and he, himself, opined that he also believes that if we were in the third category, that he believes that the President does, would have the constitutional authority to engage in these kind of activities.

Chairman Specter. Thank you, Senator Grassley.

Without objection we will admit into the record the letter from Senator Pat Roberts, Chairman of the Intelligence Committee, to Senator Leahy and to myself, dated February 3rd of this year.

Senator Biden.

Senator Biden. Thank you, Mr. Chairman. I hope Chairman Roberts will see it is his responsibility to also hold extensive hearings in a forum that is more appropriate, totally secret. Thus far, I am told, he intends on not holding any, which I find bordering on lacking any responsibility in terms of congressional oversight, but I hope he will do as you have done here.

General, there are two real issues here in my view, and I am going to focus on one. That is the President's reassurance as to what is exactly happening, where if in fact the only people being wiretapped or e-mails read are al Qaeda operatives contacting American citizens, I do not think you are going to find anybody in America saying, "Oh, my God, don't do that."

What is really at stake here is the administration has made assertions in the past, where their credibility has somewhat been questioned. So it is not merely the constitutional reach you have, it is what is actually happening, what is actually going on. I am going to focus on that first, if I may.

How will we know, General, when this war is over?

Attorney General Gonzales. I presume the straightforward answer, Senator, is that when al Qaeda is destroyed and no longer poses a threat to the United States. Whenever that may be--we know it is not today. We know we are still at war today. We know we will probably be at war still tomorrow, and so we know it still continues today.

Senator Biden. The truth is there is no definition of when we are going to know whether we have won, because al Qaeda, as the President points out, has mutated into many other organizations that are not directly dealing with bin Laden and are free agents themselves; is that correct?

Attorney General Gonzales. It is certainly true that there are a number of terrorist groups who share many of the same objectives of al Qaeda in terms of destroying America.

Senator Biden. So as long as any of them are there, I assume you would assert you have this plenary authority?

Attorney General Gonzales. Well, Senator, obviously, if Congress were to take some kind of action to say the President no longer has the authority to engage in electronic surveillance of the enemy, then I think that would put us into the third part of Justice Jackson's three-part test, and that would present a much harder question as to whether or not the President has the authority. As I have already indicated in response to Senator Grassley, I believe that under those circumstances--and again, it is a hard question, and it may have been irresponsible for me to offer up an opinion because I would like to have to study it. I would like the opportunity to study it. But I think the fact would present a much different case than what we had in Youngstown v. Sawyer.

Senator Biden. Why if you--and I have read everything you have submitted, and I was here when FISA was written. I was a cosponsor. I was on the Intelligence Committee and on the Foreign Relations Committee, and as the ranking member of the Foreign Relations Committee, I was charged by the Democratic leadership to be part of the small group to write the authorization for the use of force, so I have been involved in this. Does not mean I am right, but I have been deeply involved.

As I understand your reasoning, I do not understand why you would limit your eavesdropping only to foreign conversations. In other words, al Qaeda communicating from Algeria--I am making it up--or from France or Germany or wherever, to the United States. That is the assertion, it is only emanating from a foreign country, correct?

Attorney General Gonzales. Yes, sir.

Senator Biden. Why limit it to that?

Attorney General Gonzales. The authorization of the program I am talking about--well, of course, that is a presidential decision, and I believe, Senator--now I am purporting to speak for the President, but I believe it is because of trying to balance concerns that might arise that in fact the NSA was engaged in electronic surveillance with respect to domestic calls. So there was a decision made that this is the appropriate balance. There may be some in America. I suspect there are some in America who are saying, "Well, you know, if you've got reason to believe that you've got two members of al Qaeda talking to each other in America, my, God, why aren't you listening to their conversations?"

Again, this was a judgment made that this was the right balance between the security of our country and protecting the privacy interests of Americans.

Senator Biden. Well, the President said he would do everything under the law to prevent another 9/11. The communications that occurred within this country, not outside this country, which, in fact, brought about 9/11 would not be captured by the President's efforts here. Is he refusing to do it for public relations reasons, for appearance reasons, or because he thinks he does not have the constitutional authority to do it?

Attorney General Gonzales. I don't believe that it is a question of constitutional authority. That analysis, quite frankly, had not been conducted. It is not a question of public relations. In his judgment, it was the appropriate thing to do given the circumstances that we find ourselves in.

Senator Biden. Who determines what calls or e-mails are to be monitored?

Attorney General Gonzales. The decision as to which communications are to be surveilled are made by intelligence experts out at NSA. As I indicated, I believe, in response to an earlier question, these are individuals who are expert in al Qaeda aims, objectives, communications. I have heard General Hayden say that they are the best at what they do. They know about al Qaeda, and they would probably be in the best position, better than certainly any lawyer, in evaluating whether or not there is reasonable grounds to believe that this person is an agent or member of al Qaeda or an affiliated terrorist organization.

Senator Biden. How many of them are there?

Attorney General Gonzales. Senator, I do not know.

Senator Biden. There are thousands of people who work for NSA. It would be useful for us to know. Are there two people? Five people? Twenty-five people? Two hundred and fifty people? A thousand people?

Attorney General Gonzales. Senator, I don't know the exact number of people out at NSA who are working on this program. As I indicated to you, the people that are making the decision about where the surveillance should occur are people that are experts with respect to al Qaeda.

Senator Biden. Well, what are the guidelines? Are there any written guidelines they are bound by?

Attorney General Gonzales. Senator, there are guidelines. There are minimization procedures. As you know, there are minimization procedures for the work of NSA with respect to its collection activities under FISA, with respect to its collection activities under 12333, Executive Order 12333. There are minimization requirements that are generally comparable with respect to this program.

I understand there is also a monthly sort of senior directors' meeting, due diligence meeting out at NSA, where they talk about how the program is going. They evaluate how the program is going, try to identify if there are any problems. And so they spend a great deal of time making sure the program is being authorized in a way that is consistent with the President's authorization.

Senator Biden. By definition, you have acknowledged, though, these minimization--the very minimization programs that exist under FISA you are not bound by. You have acknowledged that you are not bound by FISA under this program; therefore, the minimization--are you telling me the minimization programs that exist under FISA as the way FISA is applied are adhered to?

Attorney General Gonzales. Okay. I am sorry if I was confusing in my response. What I was meaning to say is that there are minimization requirements. Those minimization requirements are basically consistent with the minimization requirements that exist with respect to FISA if FISA were to apply.

Senator Biden. Would it be in any way compromising the program if you made available to the Intelligence Committee what those minimization procedures that are being followed are?

Attorney General Gonzales. Well, of course, the minimization procedures themselves under 12333, and I believe perhaps under the FISA Court, are classified. I also believe they probably have been shared with the Intel Committee.

Senator Biden. They have not, to the best of my knowledge. They have not been shared with the Intelligence Committee, to the best of my knowledge, unless you are talking about this very small group, the Chairman and the Ranking Member.

Attorney General Gonzales. Senator, I am talking about the minimization procedures for 12333 and for FISA.

Senator Biden. Let me be very precise. I have not heard of NSA saying to the Intelligence Committee, "We are binding ourselves as we engage in this activity under the minimization procedures of 12333 as well as other statutes." I am unaware that that is written down or stated anywhere or been presented to the Intelligence Committee. Can you assure us that has been done?

Attorney General Gonzales. No, Senator, I can't assure you that.

Senator Biden. Can you assure us, General, that you are fully, totally informed and confident that you know the absolute detail with which this program is being conducted? Can you assure us, you personally, that no one is being eavesdropped upon in the United States other than someone who has a communication that is emanating from foreign soil by a suspected terrorist, al Qaeda, or otherwise?

Attorney General Gonzales. Senator, I can't give you absolute assurance--

Senator Biden. Who can?

Attorney General Gonzales. --the kind that you have asked for. Certainly General Hayden knows more about the operational details of this program. What I can give the American people assurance of is that we have a number of safeguards in place so that we can say with a high degree of confidence or certainty that what the President has authorized in connection with this program, that those procedures are being followed.

Senator Biden. Mr. Chairman, my time is up. This is why the Intelligence Committee has a responsibility to be able to look at someone and have an absolute, guaranteed assurance that under no circumstance is any American being eavesdropped upon unless it is coming from foreign soil and a suspected terrorist, and do it under oath and do it under penalty of law if they have misrepresented. I am not suggesting the Attorney General can do that. We have got to find out who can do that.

Chairman Specter. Thank you, Senator Biden.

Senator Leahy?

Senator Leahy. Mr. Chairman, just for Senator Biden's round, you put into the record the letter from Senator Roberts that was sent to the two of us concerning the authority. I want to place in the record a letter from Bruce Fein, formerly a senior Justice Department official in the Reagan administration, basically responding to Senator Roberts' letter. I mentioned earlier that Mr. Fein was very critical of this program. In fact, at that point, why don't I just put in--I have a number of things here, if I could.

Chairman Specter. Without objection, the letter from Mr. Bruce Fein will be made part of the record. And do you have other unanimous consent requests?

Senator Leahy. For other material regarding this hearing, if I might put them all in the record.

Chairman Specter. Without objection, those materials will be made a part of the record.

Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman. Thank you, Mr. Attorney General.

I think it is very interesting how the argument over this program has evolved in the last several weeks from initial concerns about the program itself now to some very different questions. And I think it is a good evolution because I doubt, if we polled the members of this Committee today, that there would be anybody who would vote against the conduct of this particular kind of surveillance.

There was then the suggestion that while the program is good, it is being conducted illegally. That was the charge, and I would submit a very serious charge, that the Ranking Member made earlier in his remarks.

It seems to me that a little humility is called for by the members of this Committee, especially before we accuse the President of committing a crime, which is what illegal activity is. If our hearings with now-Justices Alito and Roberts demonstrated anything, I think it is that there are a lot of smart lawyers in Washington, D.C., other than those who are sitting here on this Committee.

And in that regard, I appreciate the last couple of rounds of questions that were asked by Senators Kennedy, Biden, and Grassley because they got more into specifics about how we might have better oversight.

Before I get into that, let me just ask four specific questions that I think you can answer very, very briefly. I am reminded, by the way--I told one of my staff the very first time I saw a murder trial before I went to law school, I was absolutely persuaded after the prosecution's summation that this guy was guilt as could be. Then after his lawyers argued, I was absolutely certain that he was innocent. And by the time the prosecutor finished, I was once again convinced that maybe he was guilty--the bottom line being that with tough legal questions, good lawyers take both sides and there are two sides to every question and you should not prejudge. And that is what I think happened with regard to this program. Before you and others in the administration explained the legal rationale for it, there were people jumping to conclusions about its illegality.

Now, I think you made four key points, and I just want to make sure that we have got them right.

Your first key point was that Article II of the U.S. Constitution has always been interpreted as allowing the President to do what is necessary to conduct war, and that includes surveillance of the enemy. Is that right?

Attorney General Gonzales. Yes, Senator.

Senator Kyl. Secondly, that when Congress passed the authorization of military force on September 18, 2001, we actually did two things in that resolution. First of all, we affirmed the President's constitutional authority that I just spoke of.

Attorney General Gonzales. Yes.

Senator Kyl. And, secondly, we granted authority that included the words "all necessary and appropriate force."

Attorney General Gonzales. Yes.

Senator Kyl. And your point has been that that activity has always included surveillance of the enemy and, in fact, that the FISA Court itself has said that--has commented on that inherent authority in a situation in which it involved the detention of an American citizen who was involved in terrorist activity.

Attorney General Gonzales. That would be the Supreme Court, Senator, not the FISA Court.

Senator Kyl. The Supreme Court. I am sorry.

Attorney General Gonzales. Yes, Senator.

Senator Kyl. And that also, your second point is, the statutory authorization is contemplated in the FISA language except as authorized by statute.

Attorney General Gonzales. That is correct. We are acting in a way that the President has authorized activities that are consistent with what FISA anticipated.

Senator Kyl. Right. The third point is you talked a little bit about FISA and noted that in your view--and it is difficult to further discuss the point because you cannot discuss the detail of the program itself, but that the 1978 FISA law is really not well suited to the particular kind of program that is being conducted here, including the 72-hour provision of FISA. Is that correct?

Attorney General Gonzales. That is correct, Senator, but I don't want these hearings to conclude today with the notion that FISA has not been effective. And, again, I think a lot of the safeguards, some of the procedures in FISA make a lot of sense. When you are talking about a peacetime situation, particularly domestic surveillance--FISA also covers that kind of activity. And so when you are talking about amending FISA because FISA is broke, well, the procedures in FISA under certain circumstances I think seem quite reasonable.

Senator Kyl. And you continue to use FISA not only--well, you continue to use FISA including in regard to the war on terrorism.

Attorney General Gonzales. Absolutely.

Senator Kyl. The fourth key point that you argued about the checks and balances in the program, the fact that it has to be reauthorized every 45 days by the President himself, that there has been extensive congressional briefing of the Democrat and Republican leaders and Chairmen and Ranking Members, respectively, of the Intelligence Committee, and that there is extensive IG review. Is that correct?

Attorney General Gonzales. That is correct.

Senator Kyl. And the Inspector General is what Inspector General?

Attorney General Gonzales. This is the Inspector General for the NSA.

Senator Kyl. Okay. In addition, you noted the two qualifications of the program: international communications involving al Qaeda or affiliated individuals.

Attorney General Gonzales. That is correct, Senator.

Senator Kyl. And, finally, you noted that this was as interpreted by the NSA professionals.

Now, I thought there were two particularly interesting lines of inquiry, and one was Senator Biden's question about whether or not, if this program is really necessary, we shouldn't try to evaluate whether it should also be applied to calls from al Qaeda terrorist A to al Qaeda B, though they happen to be in the United States. And it was my understanding you said that the analysis of that had not been conducted. Is that correct?

Attorney General Gonzales. The legal analysis as to whether or not that kind of surveillance--we haven't done that kind of analysis because, of course, the President--that is not what the President has authorized.

Senator Kyl. I understand that, but I would suggest that that analysis should be undertaken because I think most Americans now appreciate that this is a very important program. It might warn us of an impending attack. It could be that the attackers are already in United States, and, therefore, it could involve communication within the United States. Understanding the need to balance the potential intrusion on privacy of American citizens within the United States, you would want to have a very careful constitutional analysis, and certainly the President would not want to authorize such an activity unless he felt that he was on very sound legal ground.

On the other hand, there is no less reason to do it than there is to intercept international communications with respect to a potential terrorist warning or attack. So I would submit that Senator Biden is correct and that this--at least the inference was in his question that this study should be accomplished, and I would think that it should.

I also think that both he and Senator Grassley and Senator Kennedy to some extent talked about, well, what happens if we are wrong here? How can we be assured that there is no improper surveillance? And in this regard, I would ask you to think about it, and if you care to comment right now, fine. But this might hit you cold.

It seems to me that you might consider either in the Presidential directive and the execution of that or even potentially in congressional legislative authorization some kind of after-action report, some kind of quarterly review or some other appropriate time frame, maybe every 45 days, whatever is appropriate, to the eight people who are currently briefed in the Congress on questions such as whether the program acted as it was intended, whether it appeared that somebody might have been surveilled who under the guidelines should not have been, and if there ever were such a case, how it happened and what is done to ensure that it does not happen again, and whether there was any damage as a result of that; and also just generally whether the program is having the intended result of being able to demonstrate important information to the people that we charge with that responsibility.

It seems to me that reporting on that kind of activity, including information about the guidelines to provide some additional assurance that it is being conducted properly, would be appropriately briefed to the Members of Congress. We do have an oversight responsibility, but we are not the only governmental entity with responsibility here. The President has critical responsibility, and I agree with those who say that should there be an attack and a review of all of this activity is conducted, the President would be roundly criticized if he had a tool like this at his disposal and did not utilize it to protect the people of the United States of America.

Attorney General Gonzales. Senator, I have not been present at all the briefings with Members of Congress, but in connection with those briefings where I was present, there was discussion about requiring some of the types of issues that you have just outlined. I would be happy to take back your comments.

Senator Kyl. Thank you, Mr. Attorney General.

Chairman Specter. Thank you, Senator Kyl.

Senator Kohl?

Senator Kohl. Thank you, Mr. Chairman.

Mr. Attorney General, the administration and the Congress and the courts share a common goal: to protect the American people. We all believe that as we face the long-term threat from terrorism, we must work together to ensure that the American people are safe. We in Congress have our role to play by writing the laws that protect Americans, and you have your role executing those laws, and, of course, the courts have their role.

As part of this effort against terrorism, we have drafted many laws to give the administration the powers that it needs, and I am hopeful that we can work together again to ensure that our laws are working to protect the American people.

Mr. Attorney General, if terrorists are operating in this country or people in this country are communicating with terrorists, then, of course, we must collect whatever information we can. To accomplish this, the administration had three options, as you know. First, you could have followed the current law, which most experts believe gives you all the authority you need to listen to these calls. Second, if you thought the law inadequate, you could have asked Congress to grant you additional authority. Or, third, the course you followed, conduct warrantless spying outside current law and without new authorization.

If you had the two options that would have given you unquestionable authority to monitor these calls and one whose legality was at best questionable, then why did you go for the most questionable one? Why not either follow the law or seek new laws?

Attorney General Gonzales. Senator, I agree with you, we are a Nation of laws, and we do believe we are following the law. And we do believe that the Constitution allows the President of the United States to engage in this kind of surveillance. We also believe that the authorization to use military force represents a supplemental grant of authority by the Congress to engage in this kind of surveillance totally consistent with FISA.

If you study carefully the white paper that we have submitted, we are not arguing that somehow FISA was amended or that we are somehow overriding FISA. That is not what we are talking about here. We are acting in a manner consistent with FISA. FISA contemplates another statute. The Congress passed another--provided additional supplemental statutory grant of authority through the authorization to use military force. And so I totally agree with what you are saying. We should be acting--particularly in a time of war, I think it is good to have the branches of Government working together. It is good for the country. I believe that is what happened here. Congress exercised its Article I authorities to pass the authorization to use military force. You supplemented that with the President's constitutional authorities as Commander-in-Chief, and we are working together--

Senator Kohl. Are you saying that there was never any debate within the administration at any level or Justice Department at any level about whether or not you were pursuing the right course?

Attorney General Gonzales. Senator--

Senator Kohl. It is my understanding that there was debate.

Attorney General Gonzales. Of course, there was a great deal of debate. Think about the issues that are implicated--

Senator Kohl. Well, but if there were debate--

Attorney General Gonzales. Of course, there was debate, Senator. Think about--if I may just finish this thought. Think about the issues that are implicated here. The very complicated Foreign Intelligence Surveillance Act, it is extremely complicated; the President's inherent authority under the Constitution as Commander-in-Chief; the Fourth Amendment; the interpretation of the authorization to use military force. You have got a program that has existed over 4 years. You have multiple lawyers looking at the legal analysis. Of course, there is--I mean, this is what lawyers do. We disagree, we debate, we argue.

At the end of the day, this position represents the position of the executive branch on behalf of the President of the United States.

Senator Kohl. Well, with all of the debate we are going through today and leading up to today, it seems to me clear that there is a real question about the course you pursued. That is why we are here today, which it would seem to me justify asking the question, Why did you take the third option? And, of course, you have given your answer. But there are some of us that would question that answer. Let's just move on.

Attorney General Gonzales. Yes, Senator.

Senator Kohl. Mr. Attorney General, if applying to the secret FISA Court is too burdensome, then would you agree to after-the-fact review by the FISA Court and by Congress of the wiretaps used specifically in this program? At least in this way we can ensure going forward that the authority will never be abused by this or any other President

Attorney General Gonzales. Senator, obviously, we want to ensure that there are no abuses. The President has said we are happy to listen to your ideas about legislation. There is concern, however, that, of course, the legislative process may result--first of all, of course, we believe the President already has the authority and legislation is not necessary here. But the legislative process may result in restrictions upon the President's--attempted restrictions upon the President's inherent constitutional authority. He may not be able to protect the country in the way that he believes he has the authority to do under the Constitution. And then, finally, of course, the legislative process is one where it is pretty difficult to keep certain information confidential, again, because if you are talking about amending FISA, there are many aspects of FISA that make sense to me, they work well. Again, you are talking about--if you are talking about domestic surveillance during peacetime, I think having the kind of restrictions that are in FISA make all the sense in the world. And so you are probably talking about a very narrowly tailored, focused amendment in FISA. And, again, I am not the expert on legislation, but we are talking potentially a very narrow-focused amendment of FISA. And I think I am concerned that that process will inform our enemies about what we are doing and how we are doing it.

Subject to those concerns, of course, as the President said, we are happy to listen to your ideas.

Senator Kohl. After-the-fact review by the FISA Court, you don't have any problem with that?

Attorney General Gonzales. Again, Senator, we are happy to listen to what you--happy to consider it.

Senator Kohl. All right. Mr. Attorney General, is there anything the President cannot do in a time of war in the name of protecting our country? We saw that the Justice Department changed its position on torture, but are there other limits to the President's power? Or can, in your opinion, the President assign to himself without an act of Congress any powers that he believes are necessary?

Attorney General Gonzales. Well, of course, we are not talking about acting outside of an act of Congress here. We think in this case the President has acted with an act of Congress. And, of course, there are limits upon the President of the United States. The Constitution serves as a limit of the President. The President's authorities under Article II as Commander-in-Chief are not limitless. Obviously, Congress has a role to play in a time of war. The Constitution says Congress can declare war. The Constitution says it is Congress' job to raise and support armies. The Constitution says it is Congress' job to provide and maintain navies. It is the role of Congress to provide rules regarding capture.

And so in the arena of war, it is not true that the President inhibits--or works in that arena to the exclusion of Congress. Quite the contrary, the Framers intended that in a time of war, both branches of Government have a role to play.

Senator Kohl. If the administration investigates an American for ties to terrorism using this program and finds nothing--and, of course, news reports have indicated that this happens the vast majority of the time--then what is done with the information collected? Does the administration keep this information on file somewhere? Is it disposed of? What happens with this information?

Attorney General Gonzales. Well, let me tell you that every morning I receive an intelligence briefing out at the FBI, and there are numbers of possible threats against the United States. Many of them wash out, thank God. The fact that they wash out does not mean that we should stop our intelligence collection. Intelligence is not perfect.

In terms of what is actually done with that information, what I can say is, again, I cannot talk about specifics about it, but information is collected, information is retained, and information is disseminated in a way to protect the privacy interests of all Americans.

Senator Kohl. So you are saying the information, even if it turns out to be without any correctness, the information is retained?

Attorney General Gonzales. Senator, I cannot provide any more of an answer than the one I just gave. In terms of there are minimization requirements that exist, and we understand that we have an obligation to try to minimize intrusion into the privacy interests of Americans, and we endeavor to do that.

Senator Kohl. Just to go back to what Senator Biden and then Senator Kyl referred to about al Qaeda-to-al Qaeda within the country, you are saying we do not get involved in those cases. Now, it would--

Attorney General Gonzales. Not under the program on which I am testifying, that is right.

Senator Kohl. It seems to me that you need to tell us a little bit more because to those of us who are listening, that is incomprehensible that you would go al Qaeda-to-al Qaeda outside the country, domestic-outside the country, but you would not intrude into al Qaeda-to-al Qaeda within the country. You are very smart. So are we. And to those of us who are interacting here today, there is something that unfathomable about that remark.

Attorney General Gonzales. Well, Senator, we certainly endeavor to try to get that information in other ways if we can. But that is not what the President--

Senator Kohl. No, but isn't it--you know, we need to have some logic, some sense, some clarity to this discussion this morning.

Attorney General Gonzales. Senator, think about the reaction, the public reaction that has arisen in some quarters about this program. If the President had authorized domestic surveillance as well, even though we were talking about al Qaeda-to-al Qaeda, I think the reaction would have been twice as great. And so there was a judgment made that this was the appropriate line to draw in ensuring the security of our country and the protection of the privacy interests of Americans.

Senator Kohl. I appreciate that. And before I turn it back, yet the President has said, you know, with great justification, he is going to protect the American people regardless, and if there is some criticism, he will take the criticism. And yet you are saying al Qaeda-to-al Qaeda within the country is beyond the bounds?

Attorney General Gonzales. Senator, it is beyond the bound of the program which I am testifying about today.

Senator Kohl. Thank you.

Thank you, Mr. Chairman.

Chairman Specter. Thank you, Senator Kohl--

[Audience disruption.]

Chairman Specter. If you do not sit down immediately, you will be removed from the chamber.

Senator DeWine? Senator DeWine, that is your introduction.

Senator DeWine. Thank you, Mr. Chairman.

Senator Sessions. Mr. Chairman, I would like to state for the record that you are not a fascist.

Chairman Specter. Thank you for that reassurance, Senator Sessions.

[Laughter.]

Chairman Specter. Senator DeWine?

Senator DeWine. Mr. Chairman, this issue has been raised several times by several members. My understanding is Senator Roberts, Chairman of the Intelligence Committee, has announced that there will be a closed hearing on February 9th with Attorney General Gonzales as well as General Hayden to cover this issue.

Mr. Attorney General, thank you very much for being with us today. We have had a lot of discussion and I know we are going to continue to have discussion about this very serious constitutional issue, constitutional law issue. Let me tell you, though, what I know and what I truly believe. I truly believe that the American people expect the President of the United States in a time of national emergency and peril to take actions to protect them, even if those actions are not specifically authorized by statute. I think they expect no less. They would want the President to do no less than that.

Second, though, it is clear that there are serious legal and constitutional questions concerning whether the Fourth Amendment "reasonableness" requirement for searches requires the President, after a period of time, after a program has been in place for a period of time, to come to the Congress for statutory authorization to continue such actions. Legal scholars, Mr. Attorney General, can and certainly debating this issue. But what is not debatable is that both from a constitutional as well as from a policy point of view, the President and the American people would be stronger, this country would be stronger and the President would be stronger if he did so, if he did come to the Congress for such specific statutory authorization.

There was a reason that President George H.W. Bush and President George W. Bush both came to Congress prior to the respective wars in Iraq, even though some people argued and would still argue today that such resolutions were legally and constitutionally unnecessary. Presidents are always stronger in the conduct of foreign affairs when Congress is on board.

Statutory authorization and congressional oversight for this program would avoid what may be a very divisive, hurtful debate here in Congress. I truly believe it is in our national interest to resolve this matter as quickly as possible.

Mr. Attorney General, we need meaningful oversight by the Intelligence Committee, followed them by whatever statutory changes in the law might be appropriate.

Let me ask you, to follow on that statement, a question. What if Congress passed a law which just excluded FISA from any electronic surveillance of international communications where one party to the communications is a member of or affiliated with al Qaeda or a related terrorist group? And, further, if we went on and provided that there would be the normal oversight by both the House and the Senate Intelligence Committee, periodically that the administration would report to the Intelligence Committees on the progress of that program? We obviously have the ability within the Committee to keep such things classified. We do it all the time. What would be your reaction to that? Is that something that would be possible from your point of view?

Attorney General Gonzales. Well, I will repeat what the President has said, and that is, to the extent that Congress wants to suggest legislation, obviously we will listen to your ideas. I have already in response to an earlier question talked about some of the concerns that we have. Obviously, generally most concerns can be addressed in one way or the other, and if they could legitimately be concerns, then obviously we would listen to your questions--I mean, we would listen and consider your ideas.

Senator DeWine. I appreciate that. You know, I understand your legal position. You have made it very clear today, I think articulated it very well. The administration has articulated it. Obviously, there are others who don't agree with your position. This is going to be a debate we are going to continue to have. It just seems to me that some 4 years into this program, this debate could be put aside if--we ought to be able to find some way to be able to protect the American people, but take care of what legal issues that some might find to be there. And I would look forward, frankly, to working with you on that.

Let me move, if I could, to what to me has been a troubling question about FISA, really unrelated to this program. And you and I have talked about this before. You have talked today about how FISA is being used. Frankly, it is being used more than it has been used in the past.

Attorney General Gonzales. The use of FISA is up 18 percent from 2004 to 2005.

Senator DeWine. Let me talk about something, though, that troubles me, and I have been talking and asking about this problem since 2004. Let me give you a quote from 2004. Director Mueller of the FBI said, and I quote, "We still have some concerns, and we are addressing it with the Department of Justice. But there is still frustration out there in the field in certain areas where, because we have had to prioritize, we cannot get to certain requests for FISA as fast as perhaps we might have in the past."

My understanding, Mr. Attorney General, from recent information that I have, current information, is that there is still a backlog, that there are still what I would call mechanical problems, both in the FISA Court and at Justice. Could you just briefly address that? Because every time I see you, I am going to go back at this because--I am not saying it is your fault, but I just think it is something that working together we need to resolve. And this is something, I think, that Congress has to play a part in. If you don't have the money, if you don't have the resources, we cannot tolerate a backlog in FISA applications if it can be fixed mechanically.

Attorney General Gonzales. I appreciate the opportunity to respond to that question, Senator.

I will say that the staff, our staff at the Department of Justice--these are the experts in the FISA process--has in essence tripled since 2002. I think we all realized following the attacks on 9/11 that we needed to get more folks on board to help us with the FISA applications.

It still takes too long, in my judgment, to get FISAs approved. I described in my opening statement the process that is involved here. FISA applications are often an inch thick, and it requires a sign-off by analysts out at NSA, lawyers at NSA, lawyers at the Department, and finally me. And then it has got to be approved by the FISA Court.

I have got to tell you--I was going to try to make this point in response to a question from the Chairman--the members of the FISA Court are heroes, as far as I am concerned. They are available day or night. They are working on weekends and holidays because they want to make themselves available. They are killing themselves, quite frankly, making themselves available to be there, to sign off on a FISA application if it meets the requirements of the statute. But we still have some problems.

It is true that because of the procedures that are in FISA, it inherently is going to result in some kind of delay. And for that reason, the President made the determination that for certain very narrow circumstances, he is going to authorize the terrorist surveillance program.

But we continue to work at it, and I know you are very interested in this, and I continue to--and I look forward to continuing to have discussions with you about it.

Senator DeWine. Well, I appreciate that, Mr. Attorney General. It is something that continues to trouble me. Putting aside the issue that we are here about today, FISA is a matter of national security, and I am still hearing things that, frankly, disturb me. And it is just a question of whether this can be sped up. Some things are inherent, as you say, but I get the impression that part of the problem is not inherent and I think could be fixed.

Attorney General Gonzales. Well, one of the things that hopefully will happen soon is the creation of a new National Security Division. As you know, the PATRIOT Act has a provision in it which creates a new Assistant Attorney General for the National Security Division. We believe that division will assist in the streamlining of the FISA process.

Senator DeWine. Thank you, Mr. Attorney General.

Attorney General Gonzales. Senator? Mr. Chairman?

Chairman Specter. Thank you, Senator DeWine.

Senator Feinstein?

Attorney General Gonzales. Mr. Chairman?

Senator Sessions. Mr. Chairman, I think the Attorney General had a question.

Attorney General Gonzales. I am sorry. Could I make one point in response to Senator Kohl? I made this point, but I want to make sure that the Committee understands this in terms of domestic-to-domestic al Qaeda communications. I said that we are using other authorities. To the extent we can engage in intercepting al Qaeda domestic-to-domestic calls, even under FISA, if we can do it, we are doing it. So I don't want the American people to believe that we are doing absolutely nothing about al Qaeda domestic-to-domestic calls. The President has made a determination this is where the line is going to be, and so we operate within those boundaries. And so we take advantage of the tools that are out there. And FISA isn't always the most efficient way to deal with that, but if that is all we have, that is what we use.

So I guess I want to make sure the American people understand that we are not simply ignoring domestic-to-domestic communications of al Qaeda. We are going after it.

Chairman Specter. Thank you, Attorney General Gonzales, for that clarification.

Senator Feinstein?

Senator Feinstein. Thanks very much, Mr. Chairman.

I would like to make clear that, for me at least, this hearing is not about whether our Nation should aggressively combat terrorism. I think we all agree on that. And it is not about whether we should use sophisticated electronic surveillance to learn about terrorists' plans, intentions and capabilities. We all agree on that. And it is not about whether we should use those techniques inside the United States to guard against attacks. We all agree on that.

But this administration is effectively saying--and the Attorney General has said it today--it does not have to follow the law. And this, Mr. Attorney General, I believe is a very slippery slope. It is fraught with consequences. The Intelligence Committees have not been briefed on the scope and nature of the program. They have not been able to explore what is a link or an affiliate to al Qaeda or what minimization procedures are in place. We know nothing about the program other than what we have read in the newspapers.

And so it comes with huge shock, as Senator Leahy said, that the President of the United States in Buffalo, New York, in 2004, would say, and I quote, "Any time you hear the United States Government talking about wiretap, it requires--a wiretap requires a court order. Nothing is changed, by the way. When we are talking about chasing down terrorists, we are talking about getting a court order before we do so."

Mr. Attorney General, in light of what you and the President have said in the past month, this statement appears to be false. Do you agree?

Attorney General Gonzales. No, I don't, Senator. In fact, I take great issue with your suggestion that somehow the President of the United States was not being totally forthcoming with the American people. I have his statement, and in the sentence immediately before what you are talking about, he said he was referring to roving wiretaps. And so I think anyone who--I think--

Senator Feinstein. So you are saying that statement only relates to roving wiretaps. Is that correct?

Attorney General Gonzales. Senator, that speech was about--that discussion was about the PATRIOT Act, and right before he uttered those words that you are referring to, he said, "Secondly, there are such things as roving wiretaps. Now, by the way, any time you hear the United States Government talking about wiretaps, it requires--a wiretap requires a court order."

So, as you know, the President is not a lawyer, but this was a discussion about the PATRIOT Act. This was a discussion about roving wiretaps, and I think people are--some people are trying to take part of his statement out of context, and I think that is unfair.

Senator Feinstein. Okay, fair enough. Let me move along.

In October 2002, at a public hearing of the Senate-House joint inquiry into NSA activities, the then-NSA Director General Michael Hayden told me, "If at times I seem indirect or incomplete, I hope that you and the public understand that I have discussed our operations fully and unreservedly in earlier closed sessions."

As I mentioned, the Intelligence Committee has not been notified.

Let me ask you this: If the President determined that a truthful answer to questions posed by the Congress to you, including the questions I ask here today, would hinder his ability to function as Commander-in-Chief, does the authorization for use of military force or his asserted plenary powers authorize you to provide false or misleading answers to such questions?

Attorney General Gonzales. Absolutely no, Senator. Of course not. Nothing--

Senator Feinstein. Thank you. I just asked the question. A yes or no--

Attorney General Gonzales. --would excuse false statements before the Congress.

Senator Feinstein. All right. You have advanced what I think is a radical legal theory here today. The theory compels the conclusion that the President's power to defend the Nation is unchecked by law, that he acts alone and according to his own discretion, and that the Congress' role at best is advisory. You say that the Authorization for Use of Military Force allows the President to circumvent the Foreign Intelligence Surveillance Act, and that if the AUMF doesn't, then the Constitution does.

Senator Daschle has testified that when he was Majority Leader, the administration came to him shortly before the AUMF came to the floor and asked that the words "inside the United States" be added to the authorization, and that he said, "Absolutely not," and it was withdrawn.

The question I have is: How do you interpret congressional intent from the passage of the AUMF that it gave the administration the authority to order electronic surveillance of Americans in contravention to the FISA law?

Attorney General Gonzales. Senator, it is not in contravention of the FISA law. We believe the authorization to use military force is the kind of congressional action that the FISA law anticipated. It has never been our position that somehow the AUMF amended FISA. It has never been our position that somehow FISA has been overridden. Quite the contrary, we believe that the President's authorizations are fully consistent with the provisions of FISA. In terms of--

Senator Feinstein. Now, let me stop you just for a second. I have read the FISA law. There are only two escape hatches: one is 15 days after a declaration of war, and the second is the 72-hour provision, which was actually amended by us in the PATRIOT Act from a lower number to 72 hours. Those are the only two escape hatches in FISA.

What in FISA specifically then allows you to conduct electronic intelligence--excuse me, electronic surveillance within America on Americans?

Attorney General Gonzales. I believe that in Section 109 it talks about persons not engaged in electronic surveillance under color of law except as authorized by statute. I may not have it exactly right. We believe that that is the provision in the statute which allows us to rely upon the authorization of the use of military force.

Now, you may say, well, I disagree with that construction That may be so. There may be other constructions that may be fairly possible. We believe this is a fairly possible reading of FISA, and as the Supreme Court has said, in terms of under the Canon of Constitutional Avoidance, if you have two possible constructions of a statute and one would result in raising a constitutional issue, if the other interpretation is one that is fairly possible, that is the interpretation that must be applied. And if you reject our interpretation of FISA, Senator, then you have a situation where you have got an act of Congress in tension with the President's constitutional authority as Commander-in-Chief. And the Supreme Court has said when that happens, you go with another interpretation if it is a fair application, and that is what we have done here.

Senator Feinstein. Could you check your citation? I just read 109, and I do not believe it says that. We will talk about that after lunch.

Attorney General Gonzales. Yes, ma'am.

Senator Feinstein. Let me go on and tell you why it is a slippery slope. Senator Kennedy asked you about first-class mail, has it been opened, and you declined answering. Let me ask this way: Has any other secret order or directive been issued by the President or any other senior administration official which authorizes conduct which would otherwise be prohibited by law? Yes or no will do.

Attorney General Gonzales. Senator, the President has not authorized any conduct that I am aware of that is in contravention of law.

Senator Feinstein. Has the President ever invoked this authority with respect to any activity other than NSA surveillance?

Attorney General Gonzales. Again, Senator, I am not sure how to answer that question. The President has exercised his authority to authorize this very targeted surveillance of international communications of the enemy. I am sorry. Your question is?

Senator Feinstein. Has the President ever invoked this authority with respect to any activity other than the program we are discussing, the NSA surveillance--

Attorney General Gonzales. Senator, I am not comfortable going down the road of saying yes or no as to what the President has or has not authorized. I am here--

Senator Feinstein. Okay. That is fine. I just want to ask some others. If you don't want to answer them, don't answer them.

Attorney General Gonzales. Yes, ma'am.

Senator Feinstein. Can the President suspend the application of the Posse Comitatus Act?

Attorney General Gonzales. Of course, Senator, that is not what is at issue here.

Senator Feinstein. I understand that.

Attorney General Gonzales. This is not about law enforcement. This is about foreign intelligence.

Senator Feinstein. I am asking questions. You choose not to answer it?

Attorney General Gonzales. Yes, ma'am.

Senator Feinstein. Okay. Can the President suspend, in secret or otherwise, the application of Section 503 of the National Security Act, which states that no covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media? In other words, can he engage in otherwise illegal propaganda?

Attorney General Gonzales. Senator, let me respond to--this will probably be my response to all your questions of these kind of hypotheticals. The question as to whether or not can Congress pass a statute that is in tension with a President's constitutional authority, those are very, very difficult questions. And for me to answer those questions sort of off the cuff I think would not be responsible. I think that, again, we have got--

Senator Feinstein. Okay. That is fine. I don't want to argue with you. All I am trying to say is this is a slippery slope. Once you do one, there are a whole series of actions that can be taken, and I suspect the temptations to take them are very great. We are either a Nation that practices our rule of law or we are not.

Has any Supreme Court case since FISA held that the President can wiretap Americans once Congress has passed a law forbidding this without warrant?

Attorney General Gonzales. I think the only case that comes to mind that is really pertinent would be the 2002 case, In re Sealed Case, by the FISA Court of Review where, while the court did not decide this issue, the court acknowledged that every case that is considered this has found that the President has the inherent authority. And assuming that to be true, that court said that FISA could not encroach upon those authorities, those constitutional inherent authorities.

Senator Feinstein. My time is up. Thank you, Mr. Chairman.

Chairman Specter. Thank you, Senator Feinstein.

Senator Sessions?

Senator Sessions. Thank you.

Attorney General Gonzales, I believe you have faithfully fulfilled your responsibility to give your best honest answers to the questions so far. I think they have been very effective. If people have listened, I think they will feel much better about the program that the President has authorized and that you are explaining, because some of the news articles in particular gave the impression that there is widespread wiretapping of American citizens in domestic situations, and in every instance there is an international call. Most of us by plain language would understand "international" to be different from "domestic," and the President has limited this to international calls in which one or more parties are connected to al Qaeda. Is that correct?

Attorney General Gonzales. Sir, the program that I am talking about today, yes, is limited to international calls.

Senator Sessions. And I am sorry that there are those who would suggest that in previous testimony you may have not been truthful with the Committee. I don't believe that is your reputation. I don't believe that is fair. I think you have a good answer to any of those charges. And I also think it is unfortunate that we are in a position where, when the President is talking about the PATRIOT Act, just like we talked about the PATRIOT Act throughout the debate on the PATRIOT Act, we insisted that it did not authorize non-warrant wiretaps or searches. That is what we said about the PATRIOT Act, because it did not. So don't you think it is unfair to mix classified international surveillance issues with the PATRIOT Act debate?

Attorney General Gonzales. Well, Senator, I don't know if it is my place to characterize whether it is fair or unfair. I do believe that there is a difference, certainly in practice, and a difference recognizing the course between domestic surveillance and international surveillance.

Senator Sessions. Well, I think it is important for us to remember the world is hearing this, and so we have people suggesting the Attorney General of the United States and the President of the United States are deliberately lying. And it is not fair. It is not accurate. It is not true. So I think that is important.

With regard to the briefing of Congress, the eight members that have been designated to receive highly secret information were briefed on this program, were they not, Attorney General Gonzales?

Attorney General Gonzales. Sir, from the outset, the bipartisan leadership of the Intel Committees have been briefed in great detail about this, and there have also, in addition, been fewer briefings with respect to the bipartisan congressional leadership.

Senator Sessions. I would just note that, of course, there are eight that hold those positions, but since the beginning of the program, at least 15 individuals have been in and out of those positions, including Tom Daschle, Bob Graham, and Dick Gephardt, who are no longer in Congress, but were presumably part of that process and were aware of it and participated in passing the FISA Act and believed that it was correct to go forward. I don't think they were hot-boxed or forced into this. I believe they weighed these issues based on what they thought the national interest was and what the law was, and they made their decision not to object to this program. And there has been no formal objection by any of those members to this program, and I think it is unfair to suggest the President has acted in secret without informing key Members of Congress about this highly classified program.

Attorney General Gonzales. Senator, of course, I cannot speak for the Members of Congress, but to my knowledge, no one has asserted the program should be stopped.

Senator Sessions. I thought about the Super Bowl. There was some reference to the security intensity around that event, that police and Secret Service and every available Federal and, I guess, State agency that could be brought into that were intensely aware that there could be an attack on the Super Bowl or any other major public event like that. But the Super Bowl would be a prime target, would you not agree, of the al Qaeda types?

Attorney General Gonzales. Clearly, we would have concerns that events like the Super Bowl would be ones that would be attractive to al Qaeda.

Senator Sessions. And intelligence is valuable to that. I mean, that is the key to it, and that is what we are trying to gather, and everybody understood after 9/11 that our failure was not in the capability to stop people; it was our capability to identify them. This program seems to me to be a step forward in our ability to identify them, and I believe, as you have explained it, it is consistent with our laws.

With regard to statutory construction and how we should construe it, people have made the point that it is a general principle that a specific statute might control over a general statute. But isn't it true that if a general statute clearly contemplates certain actions and they cannot be effective without those actions, then it will overrule the more specific earlier statute?

Attorney General Gonzales. Depending on the circumstances, that would certainly be true, Senator. I might just also remind people when you are talking about general statutes versus specific statutes, this same argument was raised in connection with the Hamdi case. We had a specific statute that said no American citizen could be detained except as otherwise authorized by statute. And the Supreme Court said the authorization to use military force, even though it may have been characterized by some as a broad grant of authority, nonetheless, that was sufficient to override the prohibition in 4001(a).

Senator Sessions. I think that is absolutely critical. I believe the Hamdi case is a pivotal authority here. After FISA, after the authorization of force on al Qaeda, an American citizen was detained without trial, and the Supreme Court of the United States held that since it was part of a military action in wartime, that person could be held without trial as an incident to the authorization of force. Would you not agree that listening in on a conversation is less intrusive than putting an American citizen in jail?

Attorney General Gonzales. It would certainly seem to me that it would be less intrusive. Just for the record, the language that I keep referring to, "fundamental incident of waging war," was from Justice O'Connor. It is part of a plurality. And, of course, Justice Thomas in essence would have felt the President had the inherent authority under the Constitution to detain an American citizen.

So I just want to make sure that we are accurate in the way we describe the decisions by the court.

Senator Sessions. Well, you have been very careful about those things, and we appreciate that.

With regard to history, you made reference to history. Isn't it true--of course, President Washington instructed his army to find ways to intercept letters from British operatives. President Lincoln issued warrantless tapping of telegraph records, telegraph communications during the Civil War to try to identify troop movements of the enemy.

Is it true that President Wilson authorized the military to intercept all telephone and telegraph traffic going into and out of the United States?

Attorney General Gonzales. That is correct.

Senator Sessions. And that President Roosevelt instructed the government to use listening devices to learn the plans of spies in the United States and that he gave the military the authority to access, without review, without warrant, all telecommunications "passing between the United States and any foreign country."

Attorney General Gonzales. That is correct, sir.

Senator Sessions. What I would say to my colleagues and to the American people is under FISA and other standards that we are using today, we have far more restraints on our military and the executive branch than history has demonstrated. We have absolutely not--we are not going hog wild restraining American liberties. In fact, the trend has been to provide more and more protections, and there can be a danger that we go too far in that and allow sleeper cells in this country to operate in a way that they are successful in killing American citizens that could have been intercepted and stopped.

Attorney General Gonzales. Of course, Senator, we are doing everything we can to ensure that that does not happen.

Senator Sessions. But when you do domestic--well, I will not go into that.

I want to ask you this question about that President Clinton's administration ordered several warrantless searches on the home and property of an alleged spy, Aldrich Ames. Actually, he was convicted. Isn't that true? It also authorized a warrantless search of the Mississippi home of a suspected terrorist financier. And the Deputy Attorney General, Jamie Gorelick, the second in command of the Clinton Department of Justice, said this: "The President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes, and the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities."

Are those comments relevant to the discussion we are having today?

Attorney General Gonzales. As I understand it, that was her testimony, and I think there was an acknowledgment of the President's inherent constitutional authority.

Now, of course, some would rightly say that in response to that, FISA was changed to include physical searches, and so the question is--again, that tees up, I think, a difficult constitutional issue, whether or not--can the Congress constitutionally restrict the ability of the President of the United States to engage in surveillance of the enemy during a time of war? And, fortunately, I don't think we need to answer that question. I think in this case the Congress has authorized the President to use all necessary and appropriate force, which would include electronic surveillance of the enemy.

Senator Sessions. But Deputy Attorney General Gorelick in the Clinton administration defending these searches, she asserted it was a constitutional power of the President, and this was in a period of peace, not even in war. Isn't that correct?

Attorney General Gonzales. That is correct.

Senator Sessions. Thank you, Mr. Chairman.

Chairman Specter. Thank you, Senator Sessions.

We will now take a luncheon break, and we will resume at 1:45.

[Whereupon, at 12:35 p.m., the Committee recessed, to reconvene at 1:45 p.m., this same day.]

A F T E R N O O N S E S S I O N

[1:45 P.M.]

Chairman Specter. It is 1:45. The Committee prides itself on being prompt, and we thank you, Mr. Attorney General, for being prompt in coming back.

I think the hearings have been very productive. We've had full attendance, almost full attendance, and I think the other Senators who could not be here early--it is unusual to have Monday morning session for the United States Senate. And we have done that because this Committee has been so busy. We have asbestos reform legislation, which Senator Leahy and I are cosponsoring, which is coming to the floor later today and we have had a full platter with the confirmation of Justice Alito. We wanted to have this hearing at an early date and this was the earliest we could do, which, given the intervening holidays after the program was announced back on December 16th, we have proceeded.

We anticipated a full day of hearings and at least two rounds, and it is apparent to me at this point that we are not going to be able to finish today within a reasonable time. Senator Feingold is nodding in the affirmative. That is the first time I have got him to nod in the affirmative today, so you see we are making some progress. But I do believe there will be a full second round. We don't function too well into the evening. If we have to, we do, but it is difficult for the witness. I have conferred with the Attorney General, who has graciously consented to come back on a second day. So we will proceed through until about 5 o'clock this afternoon and then we will reschedule another day. By that time, everybody will have had a first round, and it will give us the time to digest what we have heard and we will proceed on a second day.

Senator Feingold, you are recognized.

Senator Feingold. Good afternoon, Mr. Attorney General and Mr. Chairman

Let me say, of course, we have a disagreement, Mr. Chairman, about whether this witness should have been sworn, and that is a serious disagreement. But let me nod in an affirmative way about your Pittsburgh Steelers, first of all.

[Laughter.]

Chairman Specter. Green Bay--

Senator Feingold. Green Bay will be back.

Senator Feingold. With Green Bay out of it, why not root for the Steelers, Senator Feingold.

Senator Leahy. That is why we didn't have the hearing last night.

Senator Feingold. Well, I understood that. I was curious about that.

Chairman Specter. Reset the clock at 10 minutes.

[Laughter.]

Chairman Specter. I was only kidding.

Senator Feingold. Let me also say, Mr. Chairman, despite our disagreement about the swearing-in issue, that I praise you for your candor and your leadership on this issue and for holding this hearing and the other hearings you may be holding.

I also want to compliment some of my colleagues on the other side of the aisle for their candor on this issue already, publicly. People like Senator DeWine, Senator Graham, Senator Brownback. Maybe they don't want me to mention their names, but the fact is they have publicly disputed this fantasy version of the justification of this based on the Afghanistan Resolution. It is a fantasy version that no Senator, I think, can actually believe that we authorized this wiretapping.

So the fact is, this can and should be a bipartisan issue. I see real promise for this being a bipartisan issue, and it should be. But the problem here is that what the administration has said is that when it comes to national security, the problem is that the Democrats have a pre-9/11 view of the world.

Well, let me tell you what I think the problem is. The real problem is that the President seems to have a pre-1776 view of the world. That is the problem here. All of us are committed to defeating the terrorists who threaten our country, Mr. Attorney General. It is, without a doubt, our top priority. In fact I just want to read again what you said: "As the President has said, if you are talking with al Qaeda, we want to know what you're saying." Absolutely right. No one on this Committee, I think no one in this body believes anything other than that. I want to state it as firmly as I can.

But I believe that we can and must do that without violating the Constitution or jeopardizing the freedoms on which this country was founded. Our forefathers fought a revolution, a revolution to be free from rulers who put themselves above the law. And I have to say, Mr. Chairman, I think this administration has been violating the law and is misleading the American people to try to justify it.

This hearing is not just a hearing about future possible solutions. That is fine to be part of the answer and part of the hearing. This hearing, Mr. Chairman, is also an inquiry into possible wrongdoing.

Mr. Attorney General, there have already been a few mentions today of your testimony in January of 2005, your confirmation hearing. I am going to ask you a few quick, simple and factual questions, but I want to make it clear that I don't think this hearing is about our exchange or about me or what you said to me in particular. I am concerned about your testimony at that time because I do believe it was materially misleading. But I am even more concerned about the credibility of your administration, and I am even more concerned than that about the respect for the rule of law in this country. So that is the spirit of my questions.

Mr. Attorney General, you served as White House Counsel from January 2001 until you became Attorney General in 2005. On January 6, 2005, you had a confirmation hearing for the Attorney General position before this Committee. Mr. Attorney General, you testified under oath at that hearing, didn't you?

Attorney General Gonzales. Yes, sir.

Senator Feingold. And, sir, I don't mean to belabor the point, but just so the record is clear, did you or anyone in the administration ask Chairman Specter or his staff that you not be put under oath today?

Attorney General Gonzales. Senator, I have already indicated for the record, the Chairman asked my views about being sworn in and I said I had no objection.

Senator Feingold. But did anyone, you or anyone in the administration, ask the chairman to not have you sworn?

Attorney General Gonzales. Sir, not to my knowledge.

Chairman Specter. The answer is no.

Senator Feingold. That's fine.

At the time you testified in January of 2005, you were fully aware of the NSA program, were you not?

Attorney General Gonzales. Yes, sir.

Senator Feingold. You were also fully aware at the time you testified that the Justice Department had issued a legal justification for the program. Isn't that right?

Attorney General Gonzales. Yes, there had been legal analysis performed by the Department of Justice.

Senator Feingold. And you as White House Counsel agreed with that legal analysis, didn't you?

Attorney General Gonzales. I agreed with the legal analysis, yes.

Senator Feingold. And you had signed off on the program, right?

Attorney General Gonzales. Yes. I do believe the President--I did believe at the time that the President has the authority to authorize these kind of--

Senator Feingold. And you had signed off on that legal opinion. And yet, when I specifically asked you at the January 2005 hearing whether in your opinion the President can authorize warrantless surveillance notwithstanding the foreign intelligence statutes of this country, you didn't tell us yes. Why not?

Attorney General Gonzales. Sir, I believe your question, the hypothetical you posed--and I do consider it a hypothetical--which is whether or not had the President authorized activity, and specifically electronic surveillance, in violation of the laws--and I have tried to make clear today that in the legal analysis in the white paper, the position of the administration is, is that we--the President has authorized electronic surveillance in a manner that is totally consistent, not in violation, not--not overriding provisions of FISA, but totally consistent with FISA.

Senator Feingold. Mr. Attorney General, certainly it was not a hypothetical, as we now know.

Attorney General Gonzales. Your--Senator, your question was whether or not the President had authorized certain conduct in violation of law. That was a hypothetical.

Senator Feingold. My question was whether the President could have authorized this kind of wiretapping.

Attorney General Gonzales. In violation of the criminal statutes. And our position is and has been, is that no, this is not in violation of the criminal statutes. FISA cannot be--

Senator Feingold. You said the question was merely hypothetical and that-- Look, this is what you said: It's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes. And when you said that, you knew about this program. In fact, you just told me that you had approved it and you were aware of the legal analysis to justify it. You wanted this Committee and the American people to think that this kind of program was not going on. But it was. And you knew that. And I think that is unacceptable.

Attorney General Gonzales. Senator, your question was whether or not the President had authorized conduct in violation of law, and I--

Senator Feingold. The question was whether the President--

Attorney General Gonzales. --and I have laid out--I have--

Senator Feingold. Mr. Attorney General, my question was whether the President would have the power to do that.

Attorney General Gonzales. And Senator, the President has not authorized conduct in violation of our criminal statutes. We have laid out a 42-page analysis of our legal position here. The authorities the President has exercised are totally consistent with the criminal provision. The primary criminal provision in FISA is Section 109.

Senator Feingold. I have heard all your arguments. But I want to get back to your testimony, which frankly, Mr. Attorney General, anybody that reads it basically realizes you were misleading this Committee. You could have answered the question truthfully. You could have told the Committee that, yes, in your opinion, the President has that authority. By simply saying the truth, that you believe the President has the power to wiretap Americans without a warrant, would not have exposed any classified information.

My question wasn't whether such illegal wiretapping was going on. Like almost everyone in Congress, I didn't know, of course, about the program then. It wasn't even about whether the administration believed that the President has this authority. It was a question about your view of the law--about your view of the law--during a confirmation on your nomination to be attorney general.

So of course if you had told the truth, maybe that would have jeopardized your nomination. You wanted to be confirmed. And so you let a misleading statement about one of the central issues of your confirmation, your view of executive power, stay on the record until the New York Times revealed the program.

Attorney General Gonzales. Senator, I told the truth then, I am telling the truth now. You asked about a hypothetical situation of the President of the United States authorizing electronic surveillance in violation of our criminal statutes. That has not occurred.

Senator Feingold. Mr. Chairman, I think the witness has taken mincing words to a new high. No question in my mind that when you answered the question was a hypothetical, you knew it was not a hypothetical and you were under oath at the time.

Let me switch to some other misrepresentations.

Chairman Specter. Wait a minute. Do you care to answer that Attorney General Gonzales?

Attorney General Gonzales. Senator, as I have stated before, what I said was the truth then, it is the truth today. The President of the United States has not authorized electronic surveillance in violation of our criminal statutes. We have laid out in great detail our position that the activities are totally consistent with the criminal statute.

Senator Feingold. All you had to do, Mr. Attorney General, was indicate that it was your view that it was legal. That was what my question was. I would have disagreed with your conclusion. But that is not what you said, and you referred to this as merely a hypothetical.

Mr. Attorney General, the administration officials have been very misleading in their claims in justifying the spying program. To make matters worse, last week in the State of the Union the President repeated some of these claims. For one thing, the President said that his predecessors have used the same constitutional authority that he has.

Isn't it true that the Supreme Court first found that phone conversations are protected by the Fourth Amendment in the 1967 Katz case?

Attorney General Gonzales. Yes, in the 1967 Katz case, the Supreme Court did find that telephone conversations are covered by the Fourth Amendment.

Senator Feingold. So when the Justice Department points to Presidents Wilson and Roosevelt's actions, those are really irrelevant, aren't they?

Attorney General Gonzales. Absolutely not, Senator. I think that they are important in showing that Presidents have relied upon their constitutional authority to engage in warrantless surveillance of the enemy during a time of war. The fact that the Fourth Amendment may apply doesn't mean that a warrant is necessarily required in every case. As you know, there is jurisprudence of the Supreme Court regarding special needs--normally in the national security context, outside of the ordinary criminal law context, where, because of the circumstances, searches without warrants would be justified.

Senator Feingold. Mr. Chairman, my time is up. I will continue this line of questioning later.

Chairman Specter. Thank you very much, Senator Feingold.

Senator Graham.

Senator Graham. Thank you, Mr. Chairman.

I would like to congratulate you also for having these hearings. I think what we are talking about is incredibly important for the country in terms of the future conduct of wars and how we relate constitutionally to each other, and personally how we relate. I find your testimony honest, straightforward. Your legal reasoning is well articulated. I don't agree with it all.

About hiding something about this program, is it not true that the Congress has been briefed extensively, at least a small group of Congressmen and Senators about this program?

Attorney General Gonzales. Senator, I have not been present, as I have testified before, at all of the briefings. But in the briefings that I have been present, the briefings were extensive, the briefings were detailed. Members--certain--members who were present at the briefing were given an opportunity to ask questions, to voice concerns.

Senator Graham. And if any member of this body believes that you have done something illegal, they could put in legislation to terminate this program, couldn't they? Isn't that our power?

Attorney General Gonzales. Certainly, Senator, it--

Senator Graham. Well, I would think if you believed our President was breaking the law, you would have the courage of your convictions and you would bring--you would stop funding for it.

Now, it seems to me there are two ways we can do this. We can argue what the law is, we can argue if it was broken, we can play a political dance of Shirts v. Skins, or we can find consensus as to what the law should be--and I associate myself with Senator DeWine as to what I think it should be. In a dangerous and difficult time for our country, I choose inquiry versus inquisition, collaboration versus conflict.

To me, there are two big things that this Congress faces and this President faces. In all honesty, Mr. Attorney General, the statutory force resolution argument that you are making is very dangerous in terms of its application for the future. Because if you overly interpret the force resolution--and I will be the first to say when I voted for it, I never envisioned that I was giving to this President or any other President the ability to go around FISA carte blanche.

And you are right, it is not my intent; it is the letter of the resolution. What I am saying is that if you came back next time, or the next President came back to this body, there would be a memory bank established here and I would suggest to you, Mr. Attorney General, it would be harder for the next President to get a force resolution if we take this too far and the exceptions may be a mile long. Do you share my concern?

Attorney General Gonzales. I understand your concern, Senator.

Senator Graham. Thank you. I appreciate that.

So that is just a comment about the practical application of where we could go one day if we over-interpret. Because the offer is on the table. Let's make sure we have understanding, because if we have the same understanding between the Executive, the Legislative, and the Judicial Branch, our enemy is weaker and we are stronger.

Now to the inherent authority argument. Taken to its logical conclusion, it concerns me that it could basically neuter the Congress and weaken the courts. I would like to focus a minute on the inherent-authority-of-the-President-during-a-time-of-war concept. I will give you a hypothetical and you can answer it if you choose to, and I understand if you won't.

There is a detainee in our charge, an enemy prisoner, a high-value target. We believe, reasonably believe that this person possesses information that could save millions or thousands of American lives. The President as Commander-in-Chief tells the military authorities in charge you have my permission, my authority, I am ordering you to do all things necessary, and these five things I am authorizing. Do it because I am Commander-in-Chief and we have to protect the country.

There is a preexisting statute on the book, passed by the Congress, called the Uniform Code of Military Justice. And it tells our troops that if you have a prisoner in your charge, you are not to do these things. And they are the same five things.

What do we do?

Attorney General Gonzales. Well, of course, Senator, the President has already said that we are not going to engage in torture. He has made that--that is a categorical statement by the President. As to whether or not the statute that you referred to would be constitutional, these kinds of questions are very, very difficult.

One could make the argument, for example, that the provision in the Constitution that talks about Congress under section 8 of Article I, giving Congress the specific authority to make rules regarding captures, that that would give Congress the authority to legislate in this area.

Now, there is some disagreement among scholars about what "captures" means--

Senator Graham. And I will tell you, it is talking about ships. It is not talking about people. But it is clear to me that the Congress has the authority to regulate the military, to fund the military. And the Uniform Code of Military Justice is a statutory scheme providing guidance, regulation, and punishment to the military that the Congress passes.

Attorney General Gonzales. That would probably--I think most scholars would say that would fall under that--the clause in section 8 of Article I giving the Congress the authority to pass rules regarding Government and regulation of the armed forces.

Senator Graham. And I would agree with those scholars. And the point I am trying to say is that we can tell our military don't you do this to a detainee, and you as Commander-in-Chief can tell the military we have to win the war, we have to protect ourselves. Now, what I am trying to say is that I am worried about the person in the middle here. Because if we had adopted the reasoning of the Bybee memo--that has been repudiated, appropriately--the point I was trying to make at your confirmation hearing is that the legal reasoning used in determining what torture would be under the Convention of Torture or the torture statute not only was strained and made me feel uncomfortable, it violated an existing body of law that was already on the books called the Uniform Code of Military Justice. If a military member had engaged in the conduct outlined by the Bybee memo, they could have been prosecuted for abusing a detainee because it is a crime in the military, Mr. Attorney General, for a guard to slap a prisoner, much less have something short of major organ failure.

This is really a big deal for the people fighting the war. And if you take your inherent-authority argument too far, then I am really concerned that there is no check and balance. And when the Nation is at war, I would argue, Mr. Attorney General, you need checks and balances more than ever, because within the law we put a whole group of people in jail who just looked like the enemy.

Attorney General Gonzales. Senator, if I could just respond. I am not--maybe I haven't been as precise with my words as I might have been. I don't think I have talked about inherent exclusive authority. I have talked about inherent authority under the Constitution in the Commander-in-Chief. Congress, of course, and I have said in response to other questions, they have a constitutional role to play also during a time of war.

Senator Graham. We coexist.

Now, can I get to the FISA statute in 2 minutes here? And I hope we do have another round, because this is very important. I am not here to accuse anyone of breaking the law; I want to create law that will help people fighting the war know what they can and can't do.

The FISA statute, if you look at the legislative language, they made a conscious decision back in 1978 to resolve this two-lane debate. There are two lanes you can go down as Commander-in-Chief. You can act with the Congress and you can have inherent authority as Commander-in-Chief. The FISA statute said, basically, this is the exclusive means to conduct foreign surveillance where American citizens are involved. And the Congress, it seems to me, gave you a one-lane highway, not a two-lane highway. They took the inherent-authority argument, they thought about it, they debated it, and they passed a statute--if you look at the legislative language--saying this shall be the exclusive means. And it is different than 1401.

So I guess what I am saying, Mr. Attorney General, if I buy your argument about FISA, I can't think of a reason you wouldn't have the authority ability, if you chose to, to set aside the statute on torture if you believed it impeded the war effort.

Attorney General Gonzales. Well, Senator, whether or not we set aside a statute, of course, is not--

Senator Graham. But inherent authority sets aside the statute.

Attorney General Gonzales. That is not what we are talking about here. We don't need to get to that tough question.

Senator Graham. If you don't buy the force resolution argument, if we somehow magically took that off the table, that is all you are left with is inherent authority. And Congress could tomorrow change that resolution. And that is dangerous for the country if we get in a political fight over that.

All I am saying is the inherent-authority argument in its application, to me, seems to have no boundaries when it comes to executive decisions in a time of war. It deals the Congress out, it deals the courts out and, Mr. Attorney General, there is a better way. And in our next round of questioning we will talk about that better way.

Attorney General Gonzales. Sir, can I simply make one quick response, Mr. Chairman?

Chairman Specter. You may respond, Attorney General.

Attorney General Gonzales. Well, the fact that the President, again, may have inherent authority doesn't mean that Congress has no authority in a particular area. And we look at the words of the Constitution and there are clear grants of authority to the Congress in a time of war. And so if you are talking about competing constitutional interests, that is when you get into sort of the third part of the Jackson analysis.

Senator Graham. That is where we are at right now.

Attorney General Gonzales. I don't believe that is where we are at right now, sir.

Senator Graham. That is where you are at with me.

Attorney General Gonzales. Sir, even under the third part of the Jackson analysis--and I haven't done the detailed work that obviously these kinds of questions require. These are tough questions, but I believe that the President does have the authority under the Constitution.

Chairman Specter. Thank you, Senator Graham.

Senator Schumer.

Senator Schumer. Thank you, Mr. Chairman.

And General Gonzales, I just want to make a couple of points that are important to keep in mind as we ask you questions. First, we all support a strong, robust, and vigorous national security program. Like everyone else in this room, I want the President to have all the legal tools he needs as we work together to keep our Nation safe and free, including wiretapping. And I appreciate the difficult job you and the President have balancing security and liberty. That is not an easy one.

But I firmly believe that we can have both security and rule of law. And I am sure you agree with that, General Gonzales, don't you?

Attorney General Gonzales. Yes, Senator.

Senator Schumer. And that is what distinguishes us from so many other nations, including our enemies. Is that correct?

Attorney General Gonzales. That is correct.

Senator Schumer. Now, the first job of Government is to protect our security, and everyone on this Committee supports that. But another important job of Government is to enforce the rule of law, because the temptation to abuse the enormous power of the Government is very real. That is why we have checks and balances. They are at the fulcrum of our democracy. You agree with that?

Attorney General Gonzales. I agree with that, Senator.

Senator Schumer. I have to say, by the way, that is why I am disappointed that Chairman Specter wouldn't let us show the clip of the President's speech. Senator Specter said that the transcript speaks for itself. But seeing the speech with its nuances is actually very different from reading the record. And when you watch the speech, it seems clear that the President isn't simply talking about roving wiretaps, he is talking about all wiretaps. Because the fact that you don't wiretap citizens without a warrant has been a bedrock of American principles for decades.

Nonetheless, having said that, I am gratified that these hearings have been a lot less partisan than the previous ones we held in this room. And many Republican colleagues have voiced concerns about the administration policy. I want to salute my Republican colleagues for questioning some of these policies--Chairman Specter and Senator DeWine, Senator Brownback, Senator Graham, and others. But it is not just Republican Senators who seriously question the NSA program, but very high-ranking officials within the administration itself.

Now, you have already acknowledged that there were lawyers in the administration who expressed reservations about the NSA program. There was dissent. Is that right?

Attorney General Gonzales. Of course, Senator. This, as I indicated, these--this program implicates some very difficult issues. The war on terror has generated several issues that are very, very complicated.

Senator Schumer. Understood.

Attorney General Gonzales. Lawyers disagree.

Senator Schumer. I concede all those points.

Let me ask you about some specific reports. It has been reported by multiple news outlets that the former number 2 man in the Justice Department, the premier terrorism prosecutor, Jim Comey, expressed grave reservations about the NSA program and at least once refused to give it his blessing. Is that true?

Attorney General Gonzales. Senator, here is a response that I feel that I can give with respect to recent speculation or stories about disagreements. There has not been any serious disagreement, including--and I think this is accurate--there has not been any serious disagreement about the program that the President has confirmed. There have been disagreements about other matters regarding operations, which I cannot get into. I will also say--

Senator Schumer. But there was some--I am sorry to cut you off, but there was some dissent within the administration, and Jim Comey did express at some point--that is all I asked you--some reservations.

Attorney General Gonzales. The point I want to make is that, to my knowledge, none of the reservations dealt with the program that we are talking about today. They dealt with operational capabilities that we are not talking about today.

Senator Schumer. I want to ask you again about them, just we have limited time.

Attorney General Gonzales. Yes, sir.

Senator Schumer. It has also been reported that the head of the Office of Legal Counsel, Jack Goldsmith, respected lawyer and professor at Harvard Law School, expressed reservations about the program. Is that true?

Attorney General Gonzales. Senator, rather than going individual by individual--

Senator Schumer. No, I think we are--this is--

Attorney General Gonzales. --by individual, let me just say that I think the differing views that have been the subject of some of these stories does not--did not deal with the program that I am here testifying about today.

Senator Schumer. But you are telling us that none of these people expressed any reservations about the ultimate program. Is that right?

Attorney General Gonzales. Senator, I want to be very careful here. Because of course I am here only testifying about what the President has confirmed. And with respect to what the President has confirmed, I believe--I do not believe that these DOJ officials that you are identifying had concerns about this program.

Senator Schumer. There are other reports--I am sorry to--I want to--you are not giving the yes-or-no answer here. I understand that. Newsweek reported that several Department of Justice lawyers were so concerned about the legal basis for the NSA program that they went so far as to line up private lawyers. Do you know if that is true?

Attorney General Gonzales. I do not know if that is true.

Senator Schumer. Now let me just ask you a question here. You mentioned earlier that you had no problem with Attorney General Ashcroft, someone else--I didn't want to ask you about him; he is your predecessor--people have said had doubts. But you said that you had no problem with him coming before this Committee and testifying when Senator Specter asked. Is that right?

Attorney General Gonzales. Senator, who the Chairman chooses to call as a witness is up to the Chairman.

Senator Schumer. The administration doesn't object to that, do they?

Attorney General Gonzales. Obviously, the administration, by saying that we would have no objection, doesn't mean that we would waive any privileges that might exist.

Senator Schumer. I understand. I got that.

Attorney General Gonzales. That is up to the Chairman.

Senator Schumer. But I assume the same would go for Mr. Comey, Mr. Goldsmith, and any other individuals: Assuming you didn't waive executive privilege, you wouldn't have an objection to them coming before this Committee.

Attorney General Gonzales. Attorney-client privilege, deliberative privilege--to the extent that there are privileges, it is up to the Chairman to decide who he wants to call as a witness. But let me just say, if we are engaged in a debate about what the law is and the position of the administration, that is my job and that is what I am doing here today.

Senator Schumer. I understand. And you are doing your job. And that is why I am requesting, as I have in the past but renewing it here today, reaffirmed even more strongly by your testimony and everything else, that we invite these people, that we invite former Attorney General Ashcroft, Deputy Attorney General Comey, OLC Chair Goldsmith to this hearing and actually compel them to come if they won't on their own. And as for privilege, I certainly--

Chairman Specter. If I might interrupt you for just one moment--

Senator Schumer. Please.

Chairman Specter. --and you will have extra time.

Senator Schumer. Yes. Thank you.

Chairman Specter. I think the record was in great shape where I left it. If you bring in Attorney General Ashcroft, that is a critical step.

Senator Schumer. Right.

Chairman Specter. It wasn't that I hadn't thought of Mr. Comey and Mr. Goldsmith and other people. But I sought to leave the record with the agreement of the Attorney General to bring in former Attorney General Ashcroft.

Senator Schumer. Okay, well, Mr. Chairman, I respect that. I think others are important as well. But I want to get to the issue of privilege here.

Chairman Specter. I am not saying they aren't important. I am just saying what is the best way to get them here.

Senator Schumer. Okay. Well, whatever way we can I would be all for.

On privilege. Because that is going to be the issue even if they come here, as I am sure you will acknowledge, Mr. Chairman.

I take it you would have no problem with them talking about their general views on the legality of this program, just as you are talking about those.

Attorney General Gonzales. Well--

Senator Schumer. Not to go into the specific details of what happened back then, but their general views on the legality of these programs. Do you have any problem with that?

Attorney General Gonzales. The general views of the program that the President has confirmed, Senator, that is--again, if we are talking about the general views of the--

Senator Schumer. I just want them to be able to testify as freely as you have testified here. Because it wouldn't be fair, if you're an advocate of administration policies, you have one set of rules, and if you are an opponent or a possible opponent of administration policies, you have another set of rules. That is not unfair, is it?

Attorney General Gonzales. Sir, it is up to the Chairman to--

Senator Schumer. No, but would you or the administration--you as the chief legal officer--have any problem with them testifying in the same way you did about general legal views of the program.

Attorney General Gonzales. I would defer to the Chairman.

Senator Schumer. I am not asking you, sir, in all due respect, I am not asking you what the Chairman thinks. He is doing a good job here, and I don't begrudge that one bit.

Attorney General Gonzales. So my answer is I defer--

Senator Schumer. I am asking you what the administration would think in terms of exercising any claim of privilege.

Attorney General Gonzales. And again--

Senator Schumer. You are not going to have--I am sorry here--you are not going to have different rules for yourself, an administration advocate, than for these people who might be administration dissenters in one way or another, are you?

Attorney General Gonzales. Sir, I don't know if you are asking me what are they going to say--

Senator Schumer. I am not asking you that. Would the rules be the same? I think you can answer that yes or no.

Attorney General Gonzales. If they came to testify?

Senator Schumer. Correct.

Attorney General Gonzales. Well, sir, the client here is the President of the United States. I am not sure it is in my place to offer--

Senator Schumer. Or his chief--

Attorney General Gonzales. --offer a position or my recommendation to you about what I might recommend to the President of the United States.

Senator Schumer. But what would be--

Attorney General Gonzales. It would not be appropriate here.

Senator Schumer. I just am asking you as a very fine, well-educated lawyer: Should or could the rules be any different for what you are allowed to say with privilege hovering over your head, and what they are allowed to say with those same privileges hovering over their heads? Should the rules be any different? If you can't say yes to that, then we--you know, then that is fundamentally unfair. It is saying that these hearings--or it is saying, really, that the administration doesn't have the confidence to get out the whole truth.

Attorney General Gonzales. Sir, my hesitation is, is quite frankly I haven't thought recently about the issue about former employees coming to testify about their legal analysis or their legal recommendations to their client. And that is the source of my hesitation.

Senator Schumer. I was just--my time--

Chairman Specter. Senator Schumer, take 2 more minutes, for my interruption.

Senator Schumer. Well, thank you, Mr. Chairman.

Chairman Specter. Providing you move to another subject.

Senator Schumer. Well, okay.

[Laughter.]

Senator Schumer. I just--again, I think this is very important, Mr. Chairman.

Chairman Specter. Oh, I do, too.

Senator Schumer. And I think you would agree.

Chairman Specter. If this were a court room, I would move to strike all your questions and his answers because the record was so much better off before.

Senator Schumer. Well, I don't buy that, Mr. Chairman.

Chairman Specter. But take 2 more minutes on the conditions stated.

Senator Schumer. I don't buy that. I think we have to try to tie down as much as we can here. Okay?

Let me go to another bit of questions here.

You said, Mr. Attorney General, that the AUMF allowed the President--that is one of the legal justifications, the Constitution--to go ahead with this program. Now, under your legal theory, could the Government, without ever going to a judge or getting a warrant, search an American's home or office?

Attorney General Gonzales. Of course, Senator, any authorization or activity by the President would be subject to the Fourth Amendment. What you are talking about--I mean I presume you are talking about a law enforcement effort--

Senator Schumer. Let me interrupt for a minute. Aren't wiretaps subject to the Fourth Amendment as well?

Attorney General Gonzales. Of course they are.

Senator Schumer. So they are both subject. What would prevent the President's theory, your theory, given the danger, given maybe some of the difficulties, from going this far?

Attorney General Gonzales. Well, sir, it is hard to answer a hypothetical question the way that you have posed it in terms of how far do the President's authorities extend. However far they may extend, Senator, they clearly extend so far as to allow the President of the United States to engage in electronic surveillance of the enemy during a time of war.

Senator Schumer. Could he engage in electronic surveillance when the phones calls both originated and ended in the United States if there were al Qaeda suspects?

Attorney General Gonzales. I think that question was asked earlier. I have said that I do not believe that we have done the analysis on that.

Senator Schumer. I did not ask that. I asked what do you think the theory is?

Attorney General Gonzales. That is a different situation, Senator, and again, these kind of constitutional questions, I would--I could offer up a guess, but these are hard questions.

Senator Schumer. Has this come up? Has it happened?

Attorney General Gonzales. Sir, what the President has authorized is only international phone calls.

Senator Schumer. I understand. Has there been a situation brought to your attention where there were al Qaeda call--someone suspected of being part of al Qaeda or another terrorist group calling someone from the United States to the United States?

Attorney General Gonzales. Sir, now you are getting into sort of operations, and I am not going to respond to that.

Senator Schumer. I am not asking any specifics. I am asking ever.

Attorney General Gonzales. You are asking about how this program has operated, and I am not going to answer that question, sir.

Senator Schumer. Thank you, Mr. Chairman.

Chairman Specter. Thank you, Senator Schumer.

Senator Cornyn.

Senator Cornyn. Thank you, Mr. Chairman. I think your comments, Mr. Chairman, about this not being a court of law are apt, because I do not think we are going to get resolution about the disagreement among lawyers as to what the legal answer is. But I do believe it is important to have the hearing and to air the various points of view.

But I would hope, and I trust, on the lines of what Senator Schumer stated, is that there would be a consensus on the Committee and throughout the Congress that we should use all legal means available to us to gather actionable intelligence that has to potential of saving American lives. You certainly would agree with that, wouldn't you, General Gonzales?

Attorney General Gonzales. Yes, Senator.

Senator Cornyn. Some have stated the question like this. They said, "Well, has the Foreign Intelligence Surveillance Act, which was passed in 1978, authorized the President to conduct this particular program?" I have a couple of problems with that question stated that way.

Number one, the technology has surpassed what it was in 1978, so our capacity to gain actionable intelligence has certainly changed. And the very premise of the question suggests that the President can only exercise the authority that congress confers. When people talk about the law, the law that pertains to this particular question is not just the Foreign Intelligence Surveillance Act, but it includes the Constitution and the authorization for use of military force; would you agree with that, General Gonzales?

Attorney General Gonzales. Senator, you raise a very important point. People focus on the Foreign Intelligence Surveillance Act and say, this is what the words say, and that is the end of it. If you are not following it in total, you are obviously in violation of the law. That is only the beginning of the analysis. You have to look to see what Congress has done subsequent to that, and then, of course, you have to look at the Constitution. There have been many statements today about no one is above the law, and I would simply remind--and I know this does not need to be stated--but no one is above the Constitution either, not even the Congress.

Senator Cornyn. Clearly, the Supreme Court in the Hamdi case said what we all know to be the fact, and that is, no President is above the law. No person in this country, regardless of how exalted their position may be, or how relatively modest their position may be, we are all governed by the Constitution and laws of the United States.

Attorney General Gonzales. During my confirmation hearings, I talked about Justice O'Connor's statement from Hamdi, that a state of war is not a blank check for the President of the United States. I said in my hearings that I agree with that.

Senator Cornyn. General Gonzales, I regret to say that when I was just a few minutes ago watching the crawler or the caption in a cable news network, it referred to domestic surveillance, which strikes me as a fundamental error in the accuracy of the reporting of what is going on here. You made clear that what has been authorized here is not domestic surveillance, that is, starting from and ending in the United States. This is an international surveillance with known al Qaeda operatives, correct?

Attorney General Gonzales. I think people who call this a domestic surveillance program is doing a disservice to the American people. It would be like flying from Texas to Poland and saying that is a domestic flight. We know that is not true. That would be an international flight. And what we are talking about are international communications, and so I agree with your point, Senator.

Senator Cornyn. With regard to the authorization of the use of military force, some have questioned whether it was actually discussed in Congress whether surveillance of international phone calls between al Qaeda overseas and here, whether that was actually in the minds of individual members of Congress when they voted to support the authorization of the use of military force. It strikes me as odd to say that Congress authorized the Commander-in-Chief to capture, to detail, to kill, if necessary, al Qaeda, but we can't listen to their phone calls and we can't gather intelligence to find out what they are doing so we can prevent future attacks against the American people.

You have explained your legal analysis with regard to the Hamdi decision, and explaining that intelligence is a fundamental incident of war. And I think that makes good sense. Here again, I realize we have some very fine lawyers on the Committee, and there are a lot of lawyers around the country who have opined on this, some of whom have been negative, some whom have been positive. I was struck by the fact that John Schmidt, who was Associate Attorney General during the Clinton Justice Department, wrote what I thought was an eloquent op ed piece for the Chicago Tribune, dated December the 21st, 2005, agreeing with the administration's point of view, but that is only to point out that lawyers, regardless of their party affiliation, will have perhaps differing views, but again, I would hope that we are not engaged in is either a partisan debate or even an ideological debate, but a legal debate on what the Constitution and laws of the United States provide for.

Let me turn to another subject that has caused me a lot of concern, and that is our espionage laws, and the laws that criminalize the intentional leaking of classified information. It is my understanding from the news reports that the Department of Justice has undertaken an investigation to see whether those who actually leaked this program to the New York Times or any other media outlet might have violated our espionage laws. Is that correct?

Attorney General Gonzales. I can confirm, Senator, that investigation has been initiated.

Senator Cornyn. Does that investigation also include any potential violation for publishing that information?

Attorney General Gonzales. Senator, I am not going to get into specific laws that are being looked at, but, obviously, our prosecutors are going to look to see all of the laws that have been violated, and if the evidence is there, they are going to prosecute those violations.

Senator Cornyn. Well, you may give me the same answer to this next question, but I am wondering, is there any exclusion or immunity for the New York Times or any other person to receive information from a law breaker seeking to divulge classified information? Is there any explicit protection in the law that says if you receive that and you publish it, you are somehow immune from a criminal investigation?

Attorney General Gonzales. Senator, I am sure the New York Times has their own great set of lawyers, and I would hate in this public forum to provide them my views as to what would be a legitimate defense.

Senator Cornyn. There are a lot of very strange circumstances surrounding this initial report in the New York Times, including the fact that the New York Times apparently sat on this story for a year, and then, of course, the coincidence, some might say, that the story was broken on the date that Congress was going to vote--the Senate was going to vote on reauthorization of the PATRIOT Act, but we will leave that perhaps for another day.

I believe I will yield the rest of my time back. Thank you, Mr. Chairman.

Chairman Specter. Thank you very much, Senator Cornyn.

Senator Durbin.

Senator Durbin. Thank you very much, Mr. Chairman.

Thank you, Attorney General, for being here. During the course of this hearing you have referred to FISA several times as a useful tool, a useful tool in wiretapping and surveillance. I have thought about that phrase because it is a phrase that has been used by the White House too.

Referring to FISA as a useful tool in wiretapping is like referring to speed limits and troopers with radar guns as useful tools on a motoring trip. I think FISA is not there as a useful tool to the administration. It is there as a limitation on the power of a President when it comes to wiretapping. I think your use of that phrase, useful tool, captures the attitude of this administration toward this law. We will use it when it does not cause a problem; we will ignore it when we have to. I think that is why we are here today.

I am curious, Mr. Attorney General, as we get into this, and I look back on some of your previous testimony and what you said to this Committee in confirmation hearings and the like, how far will this administration go under the theories which you stated today to ignore or circumvent laws like FISA. I asked you during the course of the last--your confirmation hearing, a question about this whole power of the Commander-in-chief. I wish I could play it to you here, but there is a decision made by the Committee that we are not going to allow that sort of thing to take place, but I do believe that if I could play it, you would be asked to explain your answer to a question which I posed to you.

The question was this: "Mr. Attorney General, has this President ever invoked that authority as Commander-in-Chief or otherwise, to conclude that a law was unconstitutional and refuse to comply with it?"

Mr. Gonzales: "I believe that I stated in my June briefing about these memos that the President has not exercised that authority."

You have said to us today several times that the President is claiming his power for this domestic spying, whatever you want to call it, terrorist surveillance program, because of the President's inherent powers, his core constitutional authority of the Executive branch. And so I have to ask you point blank, as Senator Feingold asked you earlier, you knew when you answered my question that this administration had decided that it was going to basically find a way around the FISA law based on the President's, as you called it, inherent constitutional powers. So how can your response be valid today in light of what we now know?

Attorney General Gonzales. It is absolutely valid, Senator. The--and this is going to sound repetitious--but it has never been our position that we are circumventing or ignoring FISA. Quite the contrary. The President has authorized activities that are totally consistent with FISA, with what FISA contemplates. I have indicated that I believe that putting aside the question of the authorization to use military force, that while it is a tough legal question as to whether or not Congress has the authority under the Constitution to cabin or to limit the President's constitutional authority to engage in electronic surveillance of the enemy, that is not a question that we even need to get to.

It has always been our position that FISA can be and must be read in a way that it doesn't infringe upon the President's constitutional authority.

Senator Durbin. Let me read to you what your own Justice Department just issued with in the last few weeks in relation to the President's authority, the NSA program and FISA. I quote, "Because the President also has determined that NSA activities are necessary to the defense of the United States from a subsequent terrorist attack or armed conflict with al Qaeda,", I quote, "FISA would impermissibly interfere with the President's most solemn constitutional obligation to defend the United States against foreign attack."

You cannot have it both ways.

Attorney General Gonzales. And that is why--

Senator Durbin. You cannot tell me that you are not circumventing it and then publish this and say that FISA interferes with the President's constitutional authority.

Attorney General Gonzales. And that is why you have to interpret FISA in a way where you do not tee up a very difficult constitutional question under the canons of constitutional avoidance.

Senator Durbin. What you have to do is take out the express language in FISA which says it is the exclusive means, it is exclusive. The way you take it out is by referring to--and I think you have said it over and over here again--you just have to look to the phrase you say, "except as otherwise authorized by statute."

Senator Feinstein and I were struggling. We were looking through FISA. Where is that phrase, "except as otherwise authorized by statute?" It is not in FISA. It is not in the FISA law. You may find it in the criminal statute and may want to adopt it by reference, but this FISA law, signed by a President and the law of the land, is the exclusive way that a President can wiretap.

I want to ask you, if this is exclusive, why didn't you take advantage of the fact that you had and the President had such a strong bipartisan support for fighting terrorism that we gave the President the PATRIOT Act with only one dissenting vote? We have supported this President with every dollar he has asked for to fight terrorism. Why didn't you come to this Congress and say, "There are certain things we need to change," which you characterized as cumbersome and burdensome in FISA. Why didn't you work with us to make the law better and stronger and more effective when you knew that you had a bipartisan consensus behind you?

Attorney General Gonzales. Senator, the primary criminal code, criminal provision in FISA, section 109, 50 U.S.C. 1809, it is page 179 if you have one of these books, provides that "a person is guilty of an offense if he intentionally engages in electronic surveillance under cover of law except as authorized by statute." This provision means that you have to engage in electronic surveillance as provided here, except as otherwise provided by statute. And this is a provision that we were relying upon. It is in the Foreign Intelligence Surveillance Act.

Senator Durbin. It is Title 18. But let me just tell you, what you do not want to read to us--

Attorney General Gonzales. Sir, it is not Title 18.

Senator Durbin. The Foreign Intelligence Surveillance Act of 1978 "shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, interception of domestic wire or electronic communication may be conducted."

And so what you said is, well, when you authorized the war, you must have known that we were going to really expand beyond FISA. I have the book here. You can look through it if you like. There is not a single reference in our passing this AUMF that we talk about, Authorized Use of Military Force, not a single reference to surveillance and intelligence in the manner that you have described it.

Attorney General Gonzales. Sir, there is probably not a single reference to detainment of American citizens either, but the Supreme Court has said that that is exactly what you have authorized because it is a fundamental incident of waging war.

Senator Durbin. Since you have quoted that repeatedly, let me read what that Court has said. Hamdi decision: "We conclude that detention of individuals falling into the limited category we are considering for the duration of the particular conflict in which they are captured is so fundamental and accepted an incident to war to be an exercise of necessary and appropriate force."

Attorney General Gonzales. No question. That case was not about electronic surveillance. I will concede that.

Senator Durbin. I will tell you something else, Mr. Attorney General, if you then read, I think, the fine reasoning of Justice O'Connor, she comes to a point which brings us here today--and I thank the Chairman for allowing us to be here today--and this is what she says in the course of this decision. "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested, and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

We have said repeatedly, as nominees for the Supreme Court have come here, do you accept the basis of Hamdi, that a war is not a blank check for a President? They have said, yes, that is consistent with Jackson and Youngstown. Now what we hear from you is that you were going to take this decision in Hamdi and build it into a way to avoid the most basic statute when it comes to electronic surveillance in America, a statue which describes itself as the exclusive means by which this Government can legally do this.

Attorney General Gonzales. Senator, I think that in reading that provision you just cited, you have to consider section 109. Section 109 contemplates an additional authorization by the Congress. Congress provided that additional authorization when it authorized the use of military force following the attacks of 9/11.

Senator Durbin. The last thing I would like to say--and I only have a minute to go--is the greatest fear that we have is that what this President is now claiming is going to go far beyond what you have described today. What you have described today is something we would all join in on a bipartisan basis to support, use every wiretap capacity you have to stop dangerous terrorists from hurting Americans. If you came to Capitol Hill and asked us to change a law in a reasonable way to reach that goal, you would have the same bipartisan support. Our concern is what his President is asking for will allow this administration to comb through thousands of ordinary Americans' e-mails and phone calls.

In the audience today is Richard Fleischer of Willow Brook, Illinois. I do not know if Mr. Fleischer is still here. Mr. Fleischer wrote to the NSA and asked if he had been wiretapped because he had had conversations with people overseas. And after several letters that he sent back and forth, the best he could get from the National Security Administration is that they would neither confirm nor deny the existence of records responsive to his request. Ordinary Americans wondering if their telephone calls, if their e-mails overseas have been wiretapped, and there is no safeguard for their liberty and freedom.

What we have today is your announcement that career professionals and experts will watch out for the freedoms of America. Career professionals and experts, sadly, in our Nation's history, have done things in the past that we are not proud of. Career professionals have made bad decisions, Japanese internment camps, enemies list. What we really rely on is the rule of law and the Constitution, safeguards we can trust by people we can see. When it comes to some person working at NSA, I don't think it gives us much comfort.

Chairman Specter. Thank you, Senator Durbin.

Before yielding to Senator Brownback, I want to announce that I am going to have to excuse myself for just a few minutes. We are starting on floor debate this afternoon at 3:00 o'clock on the Asbestos Reform Bill, which Senator Leahy and I are cosponsors, and I am scheduled to start the debate at 3:00 o'clock, and I will return as soon as I have made a floor statement. In the interim, Senator Hatch has agreed to chair the hearing.

Senator Brownback, you are recognized.

Senator Brownback. Thank you, Mr. Chairman. I appreciate the hearing.

Attorney General, thank you for being here. I want to look at the reason we are in this war on terrorism. I want to talk about the length of time we may be in this war on terrorism, and then I went to look at FISA's use forward from this point in the war on terrorism.

I do not need to remind the Attorney General, but I certainly would my colleagues, that we are very actively engaged in a war on terrorism today. January 19th of this year, Osama bin Laden in a tape says this, quote, "The reason why we didn't have such an operation will take place and you will see such operations by the grace of God." And by that he is talking about more 9/11s, and that was January 19th, 2006.

Al-Zawahiri, number two person, January 30th of this year says this, "Bush, do you know where I am? Among the Muslim masses enjoying their care with God's blessings and sharing with them their holy war against you until we defeat you, God willing. The Lion of Islam, Sheik Osama bin Laden, may God protect him, offered you a decent exit from your dilemma, but your leaders who are keen to accumulate wealth insist on throwing you in battles and killing your souls in Iraq and Afghanistan, and God willing, on your own land."

I just want to remind people that as we get away from 9/11 and 2001, we not forget that we are still very much in a war on terrorism and people are very much at war against us.

We are talking about probably one of the lead techniques we can use in this war, which I would note, in recent testimony, General Hayden said this about the technique of the information you are using right now. He said, "Had this program been in effect prior to 9/11, it's my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such."

Mr. Attorney General, I don't know if you have a different opinion from General Hayden on that, but--

Attorney General Gonzales. I never have a different opinion from General Hayden on the intel capabilities that we are talking about here. Both he and Director Mueller have recently testified about the importance of the terrorist surveillance program. General Hayden did say it has been very successful, and we have gotten information we would not have otherwise gotten, that it has helped us, I think he said deter and detect attacks here and abroad.

FBI Director Mueller said that it was a valuable tool, had helped identify would-be terrorists in the United States and helped identify individuals providing material support to terrorists. So those are experts saying how valuable this tool has been.

Senator Brownback. Having said that, I have read through most of your white paper material, and I have looked at a great deal of it. I am struck and I think we have an issue we need to deal with. Part of what we are working off of is a war declaration dated September 18th, 2001, a war declaration on Afghanistan, and a war declaration, October 16th, 2002 on use of military force in Iraq, and all necessary force, and all necessary--the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks.

It strikes me that we are going to be in this war on terrorism possibly for decades. Maybe not, but this could be the Cold War of our generation. Maybe it does not go that period of time, but it has the possibilities of going for some extended period of time. I share Senator DeWine's concern that we should look then at the FISA law and make sure that as we move forward on this, that we are not just depending upon these authorizations of war to say that that puts us in a superior position under the Article II powers, but that to maintain the support of the American public, to have another set of eyes also looking at this surveillance technique is an important thing in maintaining the public support for this.

I want to look and direct you to looking at the FISA law in particular. You have made some comments here this morning, today, that have been very well stated and thought through. You have to one point, the FISA law was not well structured to the needs of today's terrorist war effort. That law was passed, what, 27 years ago, or something of that nature, and certainly didn't contemplate a war on terrorism like we are in today.

I want to look specifically at how we could amend that FISA law, looking at a possible decades long war on terrorism.

One of the areas you have talked about that is cumbersome is the 72-hour provision within the law, if I am gathering what you are saying correctly. Congress extended this period from 24 to 72 hours in 2001. Just looking narrowly at what would need to be done to use the FISA authority more broadly and still be able to stop terrorists, if that is extended further, would it make it more likely that you would use the FISA process, if that is extended beyond 72 hours?

Attorney General Gonzales. It is hard to say, Senator, because, you know, whether it is 24, 72, whatever, I have got to make a determination under the law that at the time I grant emergency authorization, that all the requirements of FISA are met. I think General Hayden said it best yesterday, this is not a 72-hour sort of hall pass. I have got to know, when I grant that authorization, whether I then have 24 or 72 hours to submit a written application to the court, I have to know at the time I say, "Yes, go forward," that all the requirements of FISA are met. That is the problem.

If I could just also make one final point.

Senator Brownback. Fair enough.

Attorney General Gonzales. There was not a war declaration either in connection with al Qaeda or in Iraq. It was an authorization to use military force. I only want to clarify that because there are implications--Obviously, when you talk about a war declaration, you are possibly talking about affecting treaties, diplomatic relations, and so there is a distinction in law and in practice, and we are not talking about a war declaration. This is an authorization only to use military force.

Senator Brownback. Looking forward in the war on terrorism and the use of FISA and this Committee's desire, I believe, to have the administration wherever possible and more frequently use FISA--and you noted you have used it more this past year than the year before--what specific areas would make this decision on your part easier, more likely to use the FISA process?

Attorney General Gonzales. well, Senator, if you are talking about domestic surveillance in a peacetime situation, for other kinds of terrorists beyond al Qaeda, I am not sure--

Senator Brownback. No. I am talking about the war on terrorism.

Attorney General Gonzales. Senator, I would like the opportunity to think about that and maybe talk to the experts in the Department, I think would have a better sense about what kinds of specific things. I can say that the PATRIOT Act includes a provision which allows these orders to stay in place a longer period of time before they are renewed. It is quite burdensome, the fact that these things expire. We then have to go back and get a renewal. That just places an additional burden on our staff, but I would like to have the opportunity to get back to you about what other kinds of specific changes might be helpful.

Senator Brownback. If you could, because I think we are going to be in this for a period of time, and we are going to be in it for succeeding administrations in this war on terrorism, and probably our most valuable tool that we have is information, early information, to be able to cut this off. So the American public, I think, clearly wants us to be able to get as much information as we can. And yet, I think we need to provide a process that has as much security to the American public that there is no abuse in this system. This is about us trying to protect people and protect people in the United States. I want to know too, presidential authority that you are protecting. This has been talked about by the Clinton administration Attorney General before, many others. It is not just this administration at all, as others have specifically quoted. But I do think as this wears on, we really need to have those thoughts at how we can make the FISA system work better.

Attorney General Gonzales. Senator, we are likewise as concerned about ensuring that we protect the rights of all Americans.

Senator Brownback. I am sure you are, and I appreciate that. I want you to protect us from security attacks, too, and bin Laden, to my knowledge, when he normally makes a threat, he has followed through on these. This is a very active and live area. I just want to see if we can make that law change where it can work for a long-term war on terrorism.

Thank you, Mr. Chairman.

Senator Hatch. [Presiding.] Senator Leahy?

Senator Leahy. Thank you, Mr. Chairman.

Incidentally, Senator Brownback rightfully pointed out the date when FISA was enacted, but, of course, we have updated it five times since 9/11, two of those when I was Chairman. In the year 2000, the last year of the Clinton administration, they used the FISA Court 1,005 times. And in the year of September 11th, your administration there, they actually used it less times even than the Clinton administration used it before.

I am just curious. When I started this morning, I asked you a very straightforward question. I told you I would come back to it. I am sure you have had time to check for the answer during the lunch hour. So I come to you again with it. When did the Bush administration come to the conclusion that the congressional resolution authorizing the use of military force against al Qaeda also authorized warrantless wiretapping of Americans inside the United States?

Attorney General Gonzales. Sir, the authorization of this program began--

Senator Leahy. I cannot hear you. Could you pull your mike a little bit closer?

Attorney General Gonzales. Pardon me. The authorization regarding the terrorist surveillance program occurred subsequent to the authorization to use military force and prior to the PATRIOT Act.

Senator Leahy. Okay. So what you call terrorist surveillance, some would call the breaking of the foreign intelligence security. I am asking when did you decide that the authorization for use of military force gave you the power to do this? I mean, you were White House Counsel then. What date did it give you the power?

Attorney General Gonzales. Well, sir, I can't give you specific dates about when--

Senator Leahy. That is what I asked you this morning, and you had the time to go and look. You had to sign that or sign off on that before the President--when did you reach the conclusion that you didn't have to follow FISA?

Attorney General Gonzales. Sir, I am not going to give an exact date as to when the program actually commenced--

Senator Leahy. Why not?

Attorney General Gonzales. --but it has always been the case--because that is an operational detail, sir. I have already indicated--the Chairman has invited me--the Committee has invited me here today to talk about the legal analysis of what the President authorized.

Senator Leahy. We are asking for the legal analysis. I mean, obviously you had to make a determination that you had the right to do this. When did you make the determination that the AUMF gave you the right to do this?

Attorney General Gonzales. From the very outset, before the program actually commenced. It has always been the position that FISA cannot be interpreted in a way that infringes upon the President's constitutional authority, that FISA must be interpreted, can be interpreted in a way--

Senator Leahy. Did you tell anybody that when you were up here seeking the PATRIOT Act and seeking the changes in FISA? Did you tell anybody you had already determined--I mean, it is your testimony here today that you made the determination virtually immediately that you had this power without using FISA.

Attorney General Gonzales. Well, sir, the fact that we were having discussions about the PATRIOT Act and there wasn't a specific mention about electronic surveillance with respect to this program, I would remind the Committee that there was also discussion about detention in connection with the PATRIOT Act discussions. Justice Souter in the Hamdi decision made that as an argument, that clearly Congress did not authorize--

Senator Leahy. Judge Gonzales, I am not asking about what happens when you catch somebody on a battlefield and detain him. I am not asking about what you do on the battlefield in our failed attempt to catch Osama bin Laden, what we were actually asking the administration to do. I am not asking about what happens on that battlefield. I am asking why did you feel that this--now, your testimony is that virtually immediately you determined you had the power to do this warrantless wiretapping because of AUMF. You did not ask anybody up here. Did you tell anybody that you needed something more than FISA?

Attorney General Gonzales. Sir, I don't recall--did I tell anyone in Congress or tell--

Senator Leahy. Congress. Let's take Congress first.

Attorney General Gonzales. Sir, I don't recall having conversations with anyone in Congress about this.

Senator Leahy. All right. Do you recall that anybody on this Committee, which actually is the one that would be amending FISA, was told?

Attorney General Gonzales. Sir, I have no personal knowledge that anyone on this Committee was told.

Senator Leahy. Now, apparently, then, according to your interpretation, Congress--a lot of Republicans and a lot of Democrats--disagree with you on this--we were authorizing warrantless wiretapping. Were we authorizing you to go into people's medical records here in the United States by your interpretation?

Attorney General Gonzales. Senator, whatever the limits of the President's authority given under the authorization to use military force and his inherent authority as Commander-in-Chief in time of war, it clearly includes the electronic surveillance of the enemy.

Senator Leahy. Well, I would just note that you did not answer my question, but here you also said, "We have had discussions with the Congress in the past, certain Members of Congress, as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat. We were advised that that would be difficult, if not impossible."

That is your statement. Who told you that?

Attorney General Gonzales. Senator, there was discussion with a bipartisan group of Congress, leaders in Congress, leaders of the Intel Committees, to talk about legislation, and the consensus was that obtaining such legislation--the legislative process is such that it could not be successfully accomplished without compromising the program.

Senator Leahy. When did they give you that advice?

Attorney General Gonzales. Sir, that was some time in 2004.

Senator Leahy. Three years later. I mean, you have been doing this wiretapping for 3 years, and then suddenly you come up here and say, "Oh, by the way, guys, could we have a little bit of authorization for this?" Is that what you are saying?

Attorney General Gonzales. Sir, it has always been our position that the President has the authority under the authorization to use military force and under the Constitution.

Senator Leahy. It has always been your position, but, frankly, it flies in the face of the statute, Mr. Attorney General, and I doubt very much if one single person in Congress would have known that was your position, had you not known the newspapers were going to print what you were doing. Not that anybody up here knew it. When you found out the newspapers were going to print it, you came up here. Did you talk to any member of the Judiciary Committee that would actually write it? And let me ask you this: Did any member of this Committee, this Judiciary Committee that has to write the law, did anybody here tell you we could not write a law that would allow you to go after al Qaeda in the way you are talking about?

Attorney General Gonzales. Sir, I don't believe there were any discussions with any members of the Judiciary Committee about--

Senator Leahy. Even though we are the ones that have to write the law, and you are saying that you were told by Members of Congress we couldn't write a law that would fit it. And now you tell us that the Committee that has to write the law never was asked. Does this sound like a CYA on your part? It does to me.

Attorney General Gonzales. We had discussions with the bipartisan leadership of the Congress about this program.

Senator Leahy. But not from this Committee. We have both Republicans and Democrats on this Committee, you know.

Attorney General Gonzales. Yes, sir, I do know that.

Senator Leahy. And this Committee has given you--twice under my chairmanship--we have given you five amendments to FISA because you requested it. But this you never came to us.

Mr. Attorney General, can you see why I have every reason to believe we never would have found out about this if the press hadn't? Now, there has been talk about, well let's go prosecute the press. Heavens. Thank God we have a press that at least tells us what the heck you guys are doing, because you are obviously not telling us.

Attorney General Gonzales. Sir, we have advised bipartisan leadership of the Congress and the Intel Committees about this program.

Senator Leahy. Well, did you tell them that before the passage of the USA PATRIOT Act?

Attorney General Gonzales. Sir, I don't recall when the first briefing occurred, but it was shortly--my recollection is it was shortly after the program was initiated.

Senator Leahy. Okay. Well, let me ask you this then. You said several years after it started you came up here and talked to some group of Members of Congress. The press reports that the President's program of spying on Americans without warrants was shut down for some time in 2004. That sounds like the time you were up here. If the President believed the program was necessary and legally justified, why did he shut it down?

Attorney General Gonzales. Sir, you are asking me about the operations of the program, and I am not going to--

Senator Leahy. Of course. I am sorry, Mr. Attorney General. I forgot you can't answer any questions that might be relevant to this.

Well, if the President has that authority, does he also have the authority to wiretap Americans' domestic calls and e-mails under this--let me finish--under this authority if he feels it involved al Qaeda activity? I am talking about within this country, under this authority you have talked about, does he have the power under your authority to wiretap Americans within the United States if they are involved in al Qaeda activity?

Attorney General Gonzales. Sir, I have been asked this question several times--

Senator Leahy. I know, and you have had somewhat of a vague answer, so I am asking it again.

Attorney General Gonzales. And I have said that that presents a different legal question, a possibly tough constitutional question, and I am not comfortable just off the cuff talking about whether or not such activity would, in fact, be constitutional.

I will say that that is not what we are talking about here. That is now what--

Senator Leahy. Are you doing that?

Attorney General Gonzales. --the President has authorized.

Senator Leahy. Are you doing that?

Attorney General Gonzales. I cannot give you assurances. That is not what the President has authorized--

Senator Leahy. Are you doing that?

Attorney General Gonzales. --through this program.

Senator Leahy. Are you doing that?

Attorney General Gonzales. Senator, you are asking me again about operations, what are we doing.

Senator Leahy. Thank you.

Senator Hatch. Throughout this process, you don't know when it began, but at least eight Members of Congress have been informed about what has been disclosed by people who have violated the law in disclosing it and by the media that has printed the disclosures. Is that correct?

Attorney General Gonzales. That is generally correct, sir. Yes, sir.

Senator Hatch. Did you have one complaint about the program from any of the eight--and that was bipartisan, by the way, those eight people. Four Democrats--

Attorney General Gonzales. They were not partisan briefings.

Senator Hatch. Four Democrat leaders in the Congress, four Republican leaders in the Congress. Is that right?

Attorney General Gonzales. It was a bipartisan briefing, yes, sir.

Senator Hatch. Did you have any gripes or complaints about what was disclosed to them, to the best of your recollection?

Attorney General Gonzales. Well, again, I want to be careful about speaking for members, but--

Senator Hatch. I am not asking you to speak for members. I am asking you if you had any gripes or complaints.

Attorney General Gonzales. Again, I wasn't present--

Senator Hatch. Or suggestions.

Attorney General Gonzales. I wasn't present at all the briefings. But for those briefings that I was present at, they received very detailed briefings about these operations. They were given ample opportunity to ask questions. They were given ample opportunity to express concerns.

Senator Hatch. Now, you were somewhat criticized here in some of the questions that your argument that the authorized use of military force is a faulty argument because the FISA Act does not really talk about except as authorized by statute. But you have pointed out that Section 109, or if you want to be more specific, Section 1809 of Title 50, Chapter 36, subchapter 1, 1809, does say that a person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute.

Attorney General Gonzales. That is the main criminal prohibition against engaging in electronic surveillance, except as otherwise provided for by statute or except--I mean, except as otherwise provided by FISA or except as otherwise provided by statute.

Senator Hatch. Now, this authorized use of military force enabled you "to use all necessary and appropriate force against the nations, organizations, or persons the President determines planned, authorized, committed, or aided the terrorist attacks." Is that correct?

Attorney General Gonzales. This is a very important point, Senator. Think about it. The authorization does not identify specifically--it never mentions the word "al Qaeda."

It authorizes the President to engage in all necessary and appropriate force to identify those he determines, who the President determines, and the President is not able to do that without information, without intelligence, without the kind of electronic surveillance we are talking about today.

Senator Hatch. That is right. As someone who helped to write the PATRIOT Act, the original PATRIOT Act, I cannot help but express the awareness of those of us around here that here we are well over a month after the expiration of the PATRIOT Act, and we keep renewing it from month to month because we cannot get Congress to really agree on what the changes should be. Is that a fair assessment?

Attorney General Gonzales. Well, what I will say is I think the tools of the PATRIOT Act are important, and I hope that they are reauthorized quickly.

Senator Hatch. But the reason I am bringing that up is because at one time at least one report was that one of these eight members was asked--who had the program disclosed to them, at least remarked that he didn't think that a statute could be passed to resolve these issues.

Attorney General Gonzales. I do not want to attribute to any particular member that statement. What I will say is that--

Senator Hatch. You don't have to do that, but is that true?

Attorney General Gonzales. There was a consensus that pursuing the legislative process would result likely in compromising the program.

Senator Hatch. In other words, it is not easy to get things through 535 Members of Congress, 435 in the House and 100 in the Senate. Now, I know that you love the Congress and will not find any fault with any of us.

Attorney General Gonzales. Sir, you have been at this a little bit longer than I have, but it has certainly been my experience that it is sometimes difficult.

Senator Hatch. Yes, it is. Is it not true that one check on the President's power to operate the NSA surveillance program is the Congress' power over the purse, as listed in Article I, section 8 of the Constitution?

Attorney General Gonzales. Absolutely. I think even those who are sort of in the pro-executive camp in terms of the allocations of constitutional powers in a time of war would have to concede that the power of the purse is an extremely strong check on the President, on the Commander-in-Chief.

Senator Hatch. Well, I have noticed that while many in Congress have sharply criticized the President and the NSA program that we have been discussing here, I am not aware of any Member of Congress introducing legislation to end the program through either an authorization or an appropriations mechanism. But from what we know about the intent of the program today, I expect a few members of either the House or the Senate would vote to eliminate this program or cut off its funding. And the reason I state that is because all of us are concerned about this battle that we are waging, that this is not an easy battle. This is a war unlike any war we have ever had before. And it is a very secret war on their side. And I think the administration has taken the position that we have got to be very careful about disclosures on our side as well.

Is it not true that the disclosures that have occurred have very definitely hurt our ability to gather intelligence?

Attorney General Gonzales. The Director of the CIA, I believe, has publicly commented that it has hurt us.

Senator Hatch. It is important, General, to bring out that President Clinton's administration ordered several warrantless searches on the home and property of a domestic spy, Aldrich Ames. That is true, isn't it?

Attorney General Gonzales. That is correct, sir.

Senator Hatch. That was a warrantless set of searches.

Attorney General Gonzales. That is correct, sir.

Senator Hatch. And the Clinton administration also authorized a warrantless search of the Mississippi home of a suspected terrorist financier. Is that correct?

Attorney General Gonzales. I think that is correct, sir.

Senator Hatch. The Clinton Justice Department authorized these searches because it was the judgment of Deputy Attorney General Jamie Gorelick, somebody I have great admiration for--and let me quote her. It has been quoted before, but I think it is worth quoting it again. This is the Deputy Attorney General of the United States in the Clinton administration. She said, "The President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes"--now, this is against domestic people--"and the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities." You are aware of that quote.

Attorney General Gonzales. I am aware of it, yes, sir.

Senator Hatch. If the President has inherent ability to surveil American citizens in national security cases during peacetime, I guess what is bothering me, how can it be that President Bush is precluded, as some have argued, from surveilling al Qaeda sources by intercepting foreign calls into this country to people who may be al Qaeda, affiliated with al Qaeda, or affiliated with somebody who is affiliated with al Qaeda? How can that be?

Attorney General Gonzales. Senator I think that the President's authority as Commander-in-Chief obviously is stronger during a time of war. If the authorization to use military force did not exist or was repealed or was not interpreted in the way that we are advocating, then it seems to me you are teeing up a fairly difficult constitutional question as to whether or not Congress can constitutionally limit the President's ability to engage in electronic surveillance of the enemy during a time of war.

Senator Hatch. We were aware of the Clinton's administration approaches. I don't know of any Republicans who raised Cain about that.

Walter Dellinger, the former head of the Office of Legal Counsel under President Clinton, in a final opinion published on July 14, 1994, wrote, "Specifically, we believe that the prohibition on destruction of aircraft would not apply to the actions of United States military forces acting on behalf of the United States during its state of hostilities. We know specifically that the application of the provision to acts of the United States military personnel in a state of hostilities could lead to absurdities. For example, it could mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution."

General, do you believe that Walter Dellinger, who is now a critic of the President's authorization of wartime surveillance of al Qaeda, was correct in 1994?

Attorney General Gonzales. Sir, I have not studied that opinion in a while, but it sounds like it would be correct in my judgment.

Senator Hatch. All right. Now, let me just bring up again, as I understand it, just so we can repeat it one more time, the administration takes the position that a further statute on top of Section 109 of the FISA Act would also complement the Act, and the authorized use of military force granted by Congress is an acceptable, legitimate statute that goes to the point that I made earlier, to use all necessary and appropriate force against nations, organizations, or persons the President determines planned, authorized, committed, or aided the terrorist attacks, and that that justifies doing what you can to interdict these foreign terrorists who are calling in to our country to people who may also be affiliated. Now, as I understand it, that is part of it.

The second part of it is the fact that you are citing that the President does have inherent powers under Article II of the Constitution to engage in these activities; and, thirdly, that you have not violated the Fourth Amendment of the Constitution because the position you are taking under these circumstances with the obligation to protect this country are reasonable searches and seizures.

Attorney General Gonzales. I think clearly these searches are reasonable given the circumstances, the fact that we have been attacked by an enemy here within this country. I think it would fall within the special needs jurisprudence of the something that would allow warrantless searches.

Let me just say that an important component of our argument relies upon the Canon of Constitutional Avoidance, because there are--I have heard some members of the Committee say they are not sure they buy the authorization to use military force analysis. If our interpretation is simply fairly possible, if it is only fairly possible, then the Court has held that that interpretation must be adopted if it means that we can avoid a tough constitutional issue.

Senator Hatch. Well, thank you, sir. My time is done.

Senator Feinstein?

Senator Feinstein. Thank you, Mr. Chairman.

Mr. Chairman, I want to respond to you on the Jamie Gorelick, Aldrich Ames situation.

Senator Hatch. Sure.

Senator Feinstein. Because, in fact, the law was changed directly after the Aldrich Ames case. I called because I heard you say this before, so I called Jamie Gorelick, and I asked her to put this in writing. She has done so, and I have it before me now. And she points out in this letter that her 1994 testimony arose in the context of congressional consideration of an extension of FISA to cover physical searches. And at the time FISA covered only electronic surveillance, such as wiretaps.

In 1993, the Attorney General had authorized foreign intelligence physical searches in the investigation of Aldrich Ames, whose counsel thereafter raised legal challenges to those searches. Point: There was no law at that time. And then she goes on to say that the Clinton administration believed "it would be better if there were congressional authorization and judicial oversight of such searches. My testimony did not address inherent Presidential authority to conduct electronic surveillance, which was already covered by FISA."

I would ask that this letter and her testimony be entered into the record.

Senator Hatch. Without objection, it will be entered into the record.

Senator Feinstein. Thank you. You know, I respect you greatly, but I think that is a bit of a red herring.

Senator Hatch. Well, but you need to also quote in the same letter where she said, "My testimony did not address whether there would be inherent authority to conduct physical searches if FISA were extended to cover physical searches." And she goes on. We will put it into the record.

Senator Feinstein. All right. Thank you.

Senator Sessions. Mr. Chairman, could I just--

Senator Feinstein. If I--

Senator Sessions. --say one point. Just one point.

Senator Feinstein. If I have extra time, you can speak as long as you--

Senator Hatch. You will have extra time.

Senator Sessions. The Attorney General explained that when I asked him. He narrowed my question when I raised it and made that qualification. Perhaps you were not here when he did that.

Senator Feinstein. All right. Mr. Attorney General, it is my view that the briefings of the Big 8 essentially violate the law as well. I believe that is a second violation of law, because I believe that Section 502, 5 U.S.C. 413(a)(1) and (2) and (b)(1) and (2) specifically say how the Intelligence Committee should be notified. I was present in the Intelligence Committee in December of 2001 when this was considered. And Senator Graham was Chairman of the Committee, and the Committee really wanted all sensitive intelligence reported in writing. And what this did was set up a mechanism for that.

So, in my view, it was very clear that what the Intelligence Committee wanted at that time was all sensitive intelligence outside of covert to be reported to the Committee, and this set up the format.

Now, let me just move on, if I can.

Attorney General Gonzales. Senator, could I respond to that?

Senator Feinstein. Sure. Of course.

Attorney General Gonzales. Because I disagree. First of all, both Chairman Roberts and Chairman Hoekstra disagree. They believe that we have provided notice as required by the law to the Intel Committees, and they both take the position that nowhere in the law does it requires that each individual member of the Intel Committee be briefed.

The section that I think you quoted to--and I must tell you sometimes it gets kind of confusing to read these (bb)s and (ii)s. It gets kind of confusing. I think you are referring to a section which imposes an obligation on the President to ensure that agencies within the administration meet the notice requirements. If you go to the actual notice requirements under 413a.(a) and 413b.(b), those impose the obligations to make sure that the Intel Committees are currently and fully informed. However, a.(a), which deals with non-covert action, and b.(b), which deals with covert action, both have a proviso that, to the extent it doesn't mean compromising--and I am paraphrasing here--sources and methods and especially sensitive matters. And so I think we have been acting consistent with the law based upon these provisions that I just cited. There has been a long practice of giving briefings only to the Chair and Ranking or a certain limited subset of the Intel Committees. And, again, I would just simply remind the Senator, I know Chairmen guard their prerogatives jealously, and both the Chairmen of the Intel Committees, Senate and House, both Chairmen have said we have met our obligations to provide briefings to the Intel Committee.

Senator Feinstein. Well, my reading of the law, I disagree. I still disagree. I recognize we have a difference of opinion. I will propose an amendment to strengthen it in the next authorization bill. To me--and I remember being there. I remember the discussion. And, anyway, I would like to move on.

I am puzzled, and I want to go back to why you did not come for a change in FISA. Let me just read off a few of the changes that we have made to FISA. We extended the emergency exemption from 24 to 72 hours. We lowered the legal standard for surveillance to the significant purpose test. We allowed for John Doe roving wiretaps. We lowered the standard for FISA pen traps. We expanded their scope to include Internet routing information. We extended the scope of business records that can be sought under FISA. We extended the duration of FISA warrants. We broadened FISA to enable the surveillance of lone wolf terrorists. And we made the Director of National Intelligence the lead authority.

Now, in view of the changes that we have made, I cannot understand why you did not come to the Committee unless the program was much broader and you believed it would not be authorized. That is the only reason I can figure you did not come to the Committee, because if the program is as the President has said and you have said, to this date you haven't briefed the Intelligence Committee. You haven't let us ask the question, What is a link? What is an affiliate? How many people are covered? What are the precise--and I don't believe in the briefings those questions were asked. What are the precise numbers? What happens to the data? How long is it retained in the database? When are innocent people taken out of the database?

Attorney General Gonzales. Senator, I--

Senator Feinstein. I can only believe--and this is my honest view--that this program is much bigger and much broader than you want anyone to know.

Attorney General Gonzales. Well, Senator, of course, I cannot talk about aspects here that are beyond what the President has already confirmed. What I can say is that those Members of Congress who have received briefings know--I think they know, and, of course, I don't know what they actually know. But they have been briefed on all the details about all the activities. So they know what is going on.

Senator Feinstein. I understand your point of view. This morning, I asked you whether there was any Supreme Court cases--this goes to precedent--that has held that the President can wiretap Americans since the Congress passed the FISA law, and you responded In re Sealed Case.

Attorney General Gonzales. Which, of course, is not a Supreme Court case.

Senator Feinstein. That is right. I was going to bring that up, which is not a Supreme Court case.

Attorney General Gonzales. And I apologize if I was not clear.

Senator Feinstein. I just wanted to come back at you. So it is pure dicta, and--

Attorney General Gonzales. It was not. Absolutely right, Senator.

Senator Feinstein. I wanted to ask a question that you might not like, but I am going to ask it anyway. At the time of the In re Sealed Case, did the Department of Justice or other administration officials tell the FISA Court that warrantless domestic electronic wiretapping was going on?

Attorney General Gonzales. In connection with that litigation, not to my knowledge, Senator.

Senator Feinstein. Okay. And since the passage of FISA, has any court spoken specifically to the President's authority to conduct warrantless domestic electronic surveillance? Since the passage of FISA, any Supreme Court-

Attorney General Gonzales. The Supreme Court? I do not believe so. I think the last word on this by the Supreme Court is the Keith case, the 1972 case. And I think that year is right, and there the Court dealt with domestic security surveillance. And the Court was very clear, went out of its way, I believe, to make it clear that they were not talking about electronic surveillance for foreign intelligence purposes.

Senator Feinstein. Was the program mentioned to the Court in the Hamdi case?

Attorney General Gonzales. I do not know the answer to that question, Senator.

Senator Feinstein. I would appreciate it if you could find the answer and let us know.

Senator Hatch. Senator, take another 2 minutes because of our interruptions.

Senator Feinstein. Oh, thank you very much.

This morning, you said, and I quote, "Presidents throughout our history have authorized the warrantless surveillance of the enemy during wartime." Has any President ever authorized warrantless surveillance in the face of a statute passed by the Congress which prohibits that surveillance?

Attorney General Gonzales. Actually, I think there was a statute on the books in connection with the order by President Roosevelt. I want to confirm that, but it is my recollection that that is, in fact, the case, that even though there was a statute on the books, and maybe even a Supreme Court case--I cannot remember now--President Roosevelt ordered electronic surveillance.

Senator Feinstein. I would be very interested to know that.

As I understand your argument, it is that if one does not agree that the resolution to authorize military force provides a statutory exception to FISA, then FISA is unconstitutional--

Attorney General Gonzales. No--well, if that is the impression I gave, I don't want to leave you with that impression. That tees up, I think, a difficult constitutional issue. I think it is an easier issue for the executive branch side than the facts that were dealt with under Youngstown v. Sawyer, because there you were talking about the President of the United States exercising dominion over part of our domestic industry, the steel industry. Here you are talking about what I think is a much more core constitutional right of the Commander-in-Chief.

I believe that the President--that a statute that would infringe upon that I think would have some--there would be some serious constitutional questions there. But I am not prepared at this juncture to say absolutely that if the AUMF argument does not work here, that FISA is unconstitutional as applied. I am not saying that.

Senator Feinstein. All right. But you sidestep FISA using the plenary authority as Commander-in-Chief. The problem there, as I see it, is that Article I, section 8 gives the Congress the authority to make the regulations for the military. NSA is part of DOD. Therefore, the Congress has the right to make those regulations.

Attorney General Gonzales. I think that the clause you are referring to is the clause in section 8 of Article I, which clearly gives to the Congress the authority and power to make rules regarding the Government and regulation of our armed forces. And then the question is, well, electronic surveillance, is that part of the Government and regulation of our armed forces? There are many scholars who believe that there we are only talking about sort of the internal administration of our military, like court martials, like selective service.

And so I think there would be a question, a good debate and discussion about whether or not--what does that clause mean and does it give to the Congress under the Constitution the authority to impose regulations regarding electronic surveillance? I am not saying that it doesn't. I am just saying I think that is obviously a question that would have to be resolved.

Senator Hatch. Senator, your time is up.

Senator Grassley?

Senator Feinstein. Thank you very much. Thanks, Mr. Attorney General.

Senator Grassley. Thank you.

It appears to me that FISA generally requires that if surveillance is initiated under the emergency authorization provisions and an order is not obtained from the FISA Court, the judge must "cause to be served on any U.S. person named in the application and on such other U.S. persons subject to electronic surveillance as the judge" believes warranted: the fact of the application; two, the period of the surveillance; and, three, the fact that during the period information was or was not obtained.

So that brings these questions if that is a factual reading of the statute. Does this explain the caution and the care and the time that is used when deciding whether to authorize 72-hour emergency surveillance? And let me follow up. And then the possibility that if you got it wrong, could you wind up tipping off an enemy? In this case, we are worried about al Qaeda terrorists. Would this interfere with the President's ability to establish this vital early-warning system under FISA? And is this one of the reasons then--and this is the last question. Is this one of the reasons why FISA is not as nimble and quick a tool as you need to combat terrorist threats and that members of this Committee think ought to be used to a greater extent?

Attorney General Gonzales. Senator, those are all very good questions. The reason we are careful about our work in seeking a FISA is because we want to get it right. We absolutely want to get it right in every case, and we have career professionals working hard on these kinds of issues. And we want to get it right.

It is true that if I authorize an emergency--if I give an emergency authorization and an order is not obtained, my reading of the statute or my understanding of the statute is that the presumption is that the judge will then notify the target of that surveillance during that 72-hour period. We would have the opportunity and make arguments as to why the judge should not do that. But in making those arguments, we may have to disclose information certainly to the target, and if we fail, the judge may very well notify the target that they were under surveillance. And that would be damaging. That could possibly tip off a member of al Qaeda or someone working with al Qaeda that we have reasons to be concerned about their activities. And so it is one of the many reasons why we take such great care to ensure that when I grant an emergency authorization, that all the requirements of FISA are met.

The reason we have such a high approval rate at the FISA Court is not because the FISA Court is a rubber stamp. It is because we do our work in ensuring that those applications are going to meet the requirements of the statute.

Senator Grassley. What we know about al Qaeda and their method of operation, which I think at the very least we think that it involves the placement of sleeper cells in our country for months or--they look way ahead--it could even be for years for a planned attack, and the need to rely upon an electronic communication network to convey instructions to those cells from command structures that would be located for al Qaeda outside the country. The surveillance program authorized by the President was tailored precisely to meet the natures of the threat that we face as a nation, particularly with sleeper cells; would that be right?

Attorney General Gonzales. It is a narrowly tailored program, and of course, that helps us in the Fourth Amendment analysis as to whether or not are these reasonable searches, and we believe that under the special needs jurisprudence, given the fact that we have been attacked from al Qaeda within our country, we believe that these would satisfy the requirements of the Fourth Amendment.

Senator Grassley. I think in your opening statement, didn't you make a reference to bin Laden about his recent speech two weeks ago, and that is, obviously, a reiteration of the threat, and he said that these attacks, future attacks could dwarf the 9/11 magnitude? If that is true, is it in some sense incredible to you that we are sitting here having this discussion today about whether the President acted lawfully and appropriately in authorizing a program narrowly targeted an communication that could well lead to a disruption or prevention of such an attack?

Attorney General Gonzales. Senator, I think that we should all be concerned to ensure that all branches of Government are operating within the limits of the Constitution. And so I can't disagree with this hearing, the discussions, the questions in these hearings. I think we have a good story to tell from the administration viewpoint. I wish there were more that we could tell, because it is not simply a coincidence that the United States of America had not been hit again since 9/11. It is because of the brilliant and wonderful work of our men and women in the military overseas. It is because of tools like the PATRIOT Act. It is because of tools like the terrorist surveillance program.

Senator Grassley. Howard Dean, the Chairman of the Democratic Party was quoted recently as equating the terrorist surveillance program authorized by President Bush to, quote, "abuses of power during the dark days of the Nixon administration." You are awful young, but does that have a fair comparison to you? And if it is not a fair comparison, why or why not?

Attorney General Gonzales. Well, it is not a fair comparison. I would direct you and the other members of the Committee to Chairman Roberts' response to Mr. Dean in terms of making it clear that what is going on here is much more akin to the directive by President Roosevelt to his Attorney General Jackson in terms of authorizing the Department to--authorizing his administration to initiate warrantless surveillance of the enemy, and so this is--again, this is not domestic surveillance. This is not going after our political enemies. This is about international communications. This is about going after al Qaeda.

Senator Grassley. I wonder if you would discuss the nature of the threat posed by al Qaeda to our country, because al Qaeda operates not under the rules of law, but with disregard and contempt for conventional warfare. In combatting al Qaeda, can we afford to rely purely upon conventional law enforcement techniques such as those traditionally used to combat organized crime groups and al Qaeda traffickers, and if we were to do that, what would be the result?

Attorney General Gonzales. The President expects us to use all the tools available under the Constitution. Obviously, we have strong law enforcement tools that we have been using and will continue to use. But this is also a very serious military campaign, and we are going to exercise and use all the tools, again, that are available to us in fighting this new kind of threat and this new kind of war.

Senator Grassley. I think we had some discussion from you about the review that goes on every 45 days or approximately every 45 days, but the President himself said, quote, "carefully reviewed approximately every 45 days to ensure its ongoing propriety." The surveillance is then reauthorized only after the President signs off on it.

So I want to ask you a few questions about this review process. I want to ask these questions because it is important that the American people know whether the President has instituted appropriate procedures to guard against abuses. In the 42-page legal memorandum from your Department, it is noted about the program, quote, "Reviewed for legality by the Department of Justice and are monitored by the General Counsel and the Inspector General of the NSA to ensure that civil liberties are being protected."

I would like to give the opportunity to explain to the fullest extent possible, without compromising the programs, what, who, when, why, where and how of the periodic review. What can you tell us about the periodic review and reauthorization of the surveillance program? What assurances can you give the American people about their constitutional rights being zealously guarded against abuses?

Attorney General Gonzales. There is a lot there in that question, Senator. I will do my best to respond. Obviously, this is a periodic review, approximately every 45 days or so. We have people from the intelligence community evaluate whether or not al Qaeda--what is the level of threat that continues to be posed by al Qaeda.

During that period of time, we have monthly meetings out at NSA, where people who are involve in the program, senior officials, get together, sit down, talk about how the program is operating, ensuring that the program is being operated in a way that's consistent with the President's authorization.

In connection with each authorization, the Department does make an analysis with respect to the legal authority of the President of the United States to move forward. And so there are administration lawyers that are involved, looking to see whether or not does the President still have the authority to authorize the terrorist surveillance program that I have described here today.

Senator Grassley. I think my time is up. I was going to have some follow-up questions on that point, but if it is necessary, I will submit it for answer in writing.

Senator Hatch. Thank you, Senator.

Senator Feingold?

Senator Feingold. Thank you, Mr. Chairman.

General Gonzales, when my time ended last time, we were beginning to talk about the President's statements in the State of the Union that his predecessors used the same legal authority that he is asserting. Let me first ask, do you know of any other President who has authorized warrantless wiretaps outside of FISA since 1978 when FISA was passed?

Attorney General Gonzales. None come to mind, Senator, but maybe--I would be happy to look to see whether or not that is the case.

Senator Feingold. I take it as a no unless you submit something.

Attorney General Gonzales. I can't answer that--I can't give you an answer.

Senator Feingold. Okay. Isn't it true that the only Federal courts to decide the President's authority to authorize warrantless national security wiretaps were considering wiretaps carried out before the enactment of FISA?

Attorney General Gonzales. I am sorry, Senator. I was thinking about your question and I--

Senator Feingold. Would you like to answer the previous question?

Attorney General Gonzales. No, but I was trying to think of an answer, and I did not catch the first part of your second question.

Senator Feingold. Isn't it true that the only Federal courts that decide the President's authority to authorize warrantless national security wiretaps were considering wiretaps that were carried out before the enactment of FISA?

Attorney General Gonzales. In which there were actual decisions? Actually, three was a Fourth Circuit decision, the Truong decision which was decided after FISA. To be fair, I don't think they really got into an analysis.

Senator Feingold. That case was about a Vietnam era wiretap before FISA was enacted, right?

Attorney General Gonzales. The collection occurred before FISA was enacted. The decision was made after FISA, and consequently, my recollection is, is that case doesn't really get into a discussion about how the passage of FISA impacts--

Senator Feingold. It was based in facts prior to FISA, then the law that controls is the law prior to FISA, right?

Attorney General Gonzales. That is right. And then, of course, In re: Sealed Cases, that did not--

Senator Feingold. You covered that with Senator Feinstein. That was dicta, correct?

Attorney General Gonzales. Yes.

Senator Feingold. Thank you. So when the President said that Federal courts have, quote, "approved the use of that authority," unquote, if he was trying to make people think that the courts had approved the authority he is invoking and the legal theory that you put forward here, that isn't really accurate, is it?

Attorney General Gonzales. The President was totally accurate in saying that in considering the question as to whether or not the President has inherent constitutional authority to authorize warrantless searches consistent with the Fourth Amendment to obtain foreign intelligence, the statement, I think, is perfectly accurate.

Senator Feingold. But he said the Federal courts had said it was all right.

Attorney General Gonzales. That is right.

Senator Feingold. And you were not able to give me anything here since FISA that indicates that.

Attorney General Gonzales. but, Senator, I don't believe that he was making a statement since or before--he was making the statement the courts who have considered the President's inherent constitutional authority, have--the Court of Appeals have said, and I think--there are five Court of Appeals decisions cited in the In re: Sealed Case. All of them have said, I believe, that the President does have the constitutional authority to engage in this kind of surveillance.

Senator Feingold. That is why we just went over all this because all of that is based on pre-FISA law. Here is my concern. The President has somehow suggested that he could not wiretap terrorists before he authorized this program. He said, quote, "If there are people inside our country who are talking with al Qaeda, we want to know about it." Of course, I agree with that 100 percent, and we have a law that permits it. Isn't it true that FISA permits the NSA to wiretap people overseas without a court order even if they call into the United States?

Attorney General Gonzales. Well, of course, it depends, Senator.

Senator Feingold. It does do that in some circumstances, does it not?

Attorney General Gonzales. It could do it in some circumstances depending on whether or not it is a electronic surveillance as defined under FISA. As you know, they are very--I don't want to say convoluted--it is a very complicated definition of what kind of radio or wire communications would in fact be covered by FISA.

Senator Feingold. General, I understand that, but clearly, FISA in part does permit that kind of activity in certain cases?

Attorney General Gonzales. Depending on the circumstances.

Senator Feingold. To leave the impression that there is no law permitting that would be incorrect.

Attorney General Gonzales. Well, of course not. We use FISA whenever we can.

Senator Feingold. That is what I am trying to get at, is the impression that the President left, I think in the State of the Union, was not completely accurate. Isn't it true that FISA permits the FBI to wiretap individuals inside the United States who are suspected of being terrorists or spies so long as the FBI gets secret approval from a judge?

Attorney General Gonzales. Senator, I think I have already said that with respect to even domestic communications involving members of al Qaeda, we use all the tools available to us including FISA. If we can get a FISA--

Senator Feingold. So the fact is that when the President suggests that he doesn't have that, that power doesn't exist, that power does exist, at least in part, under FISA, under current law?

Attorney General Gonzales. Senator, I don't know whether or not that is what the President suggested, but clearly, the authority does exist for the FBI, assuming we can meet the requirements of FISA, assuming it is electronic surveillance covered by FISA, to engage in electronic surveillance of al Qaeda here in this country.

Senator Feingold. Here is what the President said. He said, "If there are people inside our country who are talking with al Qaeda, we want to know about it," unquote. I was sitting in the room. He sure left me the impression that he was suggesting that without this NSA program, somehow he didn't have the power to do that. That is misleading. So when the President said that he authorized a program to, quote, "aggressively pursue the international communications of suspected al Qaeda operatives and affiliates to and from America," trying to suggest that without this program he could not do that under the law, that is not really right, is it?

Attorney General Gonzales. Senator, I believe what the President has said is accurate. It is not misleading. The day following the New York Times story, he came out to American people and explained what he had authorized. We have given numerous briefings to Congress since that day. I am here today to talk about legal authorities for this program.

Senator Feingold. I think the President's comments in the State of the Union were highly misleading. The American people need to know that you already have legal authority to wiretap anyone you suspect of helping al Qaeda, and every person on this Committee and the Senate supports your use of FISA to do just that.

Let me switch to another subject. Senator Feinstein sort of got at this, but I want to try a different angle. If you can answer this with a yes or no, I would, obviously, appreciate it. Has the President taken or authorized any other actions, any other actions that would be illegal if not permitted by his constitutional powers or the authorization to use military force?

Attorney General Gonzales. Repeat your question, please, Senator.

Senator Feingold. Has the President taken or authorized any other actions that would be illegal if not permitted by his constitutional powers or the authorization to use military force?

Attorney General Gonzales. You mean in direct contradiction of a statute, and relying upon his Commander-in-Chief authority?

Senator Feingold. Has he taken any other--yes, it would be a legal--

Attorney General Gonzales. Not to my knowledge, Senator.

Senator Feingold. In other words, are there other actions under the use of military force for Afghanistan resolution that without the inherent power would not be permitted because of the FISA statute? Are there any other programs like that?

Attorney General Gonzales. Well, I guess what I would like to do, Senator, is I want to be careful about answering your question. I, obviously, cannot talk about operational matters that are not before this Committee today, and I don't want to leave you with the wrong impression. So I would like to get back to you with an answer to that question.

Senator Feingold. I definitely prefer that to then being told that something is a hypothetical.

On September 10, 2002, Associate Attorney General David Kris testified before the Senate Judiciary Committee. His prepared testimony includes the following statement. "Thus, both before and after the PATRIOT Act, FISA can be used only against foreign powers and their agents, and only where there is at least a significant foreign intelligence purpose for the surveillance. Let me repeat for emphasis, we cannot monitor anyone today whom we could not have monitored at this time last year," unquote.

And this last sentence was actually underlined for emphasis in the testimony, so let me repeat it too. "We cannot monitor anyone today whom we could not have monitored at this time last year."

Now, I understand that Mr. Kris did not know about the NSA program and has been highly critical of the legal justifications offered by the Department. I also realize that you were not the Attorney General in 2002, so I know you won't know the direct answer to my question. But can you find out--and I would like if you can give me a response in writing--who in the White House had the Department of Justice reviewed and approved Mr. Kris's testimony, and of those people, which of them were aware of the NSA program and thus let, obviously, a highly misleading statement be made to the Congress of the United States. Will you provide me with that information?

Attorney General Gonzales. We will see what we can provide to you, Senator. My understanding is, is that Mr. Kris--I don't think it is fair to characterize his position as highly critical. I think he may disagree, but saying it's highly critical I think is unfair.

Senator Feingold. We could debate that, but the point here is to get to the underlying information. I appreciate your willingness to get that for me if you can.

General Gonzales, I would like to explore a bit further the role of the telecommunications companies and Internet service providers in this program. As I understand it, surveillance often requires the assistance of these service providers, and the providers are protected from criminal and civil liability if they have been provided a court order from the FISA Court or criminal court, or if a high-ranking Justice Department official has certified in writing that, quote, "No warrant or court order is required by law that all statutory requirements have been met and that the specified assistance is required."

Am I accurately stating the law?

Attorney General Gonzales. I believe that is right, Senator, but--

Senator Feingold. Have you or anyone at the Justice Department provided any telephone companies or ISPs with these certifications in the course of implementing the NSA's program?

Attorney General Gonzales. Senator, that is an operational detail that I just can't go into in this hearing.

Senator Feingold. I look forward to an opportunity to pursue it in other venues. And thank you very much.

Attorney General Gonzales. Thank you, Senator.

Senator Hatch. Thank you, Senator.

Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman. I hadn't intended to ask any questions, but I think there are two areas that need to be cleared up, first with regard to two points that Senator Feingold said the President--in which the President made highly misleading statements, one in the State of the Union, allegedly leaving the impressions that the President had authority he did not have.

When he discussed the authority that he had that other Presidents had, or had exercised, what was he referring to there? Was he referring to FISA, or was he referring to something else?

Attorney General Gonzales. Senator, he was referring to the President's inherent constitutional authority to engage in electronic surveillance of the enemy.

Senator Kyl. Exactly. And secondly, Senator Feingold asked you if there was authority under FISA to conduct wiretaps, including of suspected al Qaeda terrorists, and that it was misleading for the President to infer otherwise. Is it possible to acknowledge that FISA authority exists while also making the point that it is not the optimal or maybe even workable method of collection of the kind that is done under the surveillance program at issue here?

Attorney General Gonzales. No question about it. It is one of the reasons for the terrorist surveillance program is that while FISA ultimately may be used, it would be used in a way that has been effective because of the procedures that are in FISA.

Senator Kyl. Thank you. Now, let me clear up a concern expressed by Senator Feinstein that the reason that Congress had not been asked to statutorily authorize this surveillance program may be because it is much bigger than we have been led to believe. Is that the reason?

Attorney General Gonzales. Senator, the reason is because, quite frankly, we didn't think we needed it under the Constitution, and also because we thought we had it with respect to the action by the Congress. We have believed from the outset that FISA has to be read in a way where it is not inconsistent with the President's constitutional authority as Commander-in-Chief.

Senator Kyl. Right. Now, there was also discussion about briefings by the intelligence community, General Hayden and perhaps others, to what has been called the Big 8, which are the 4 elected leaders, bipartisan, of the House and Senate, and 4 chairmen and ranking members of the two Intelligence Committees of the Congress. Was that the group that you referred to when you said that there had been discussion about whether to seek an amendment of FISA in the Congress?

Attorney General Gonzales. Senator, it did include the leadership of the Congress and the leadership of the Intel Committees.

Senator Kyl. In terms of evaluating--also Senator Leahy asked the question about why you did not come to the members of this Committee. Who would be in a better position to judge or to assess the impact on our intelligence with respect to compromise of the program? Would it be leadership and chairmen and ranking members of the Intelligence Committees or members of this Committee that had not been read into the program?

Attorney General Gonzales. Senator, the judgment was made that the conversation should occur with members of the Intel Committee and the leadership of the Congress, bipartisan.

Senator Kyl. And in fact, if you came to this Committee to see amendments to cover the program at issue, the members of this Committee would have to be read into the program, would they not?

Attorney General Gonzales. Yes, sir.

Senator Kyl. Senator Leahy also said thank goodness--I am paraphrasing now--thank goodness that we have the press to tell us what the administration is doing with this program because we would not know otherwise. And of course, the press did disclose the existence of this highly classified program, which you have indicated has compromised the program to some extent or has done damage to it. I forgot your exact phrase.

Attorney General Gonzales. Those, I believe, were the comments from the CIA

Director.

Senator Kyl. And it seems to me, Mr. Chairman, that the attitude that it is a good thing that this program was compromised validates the view of the bipartisan leadership that briefing members of Congress further, or at least briefing members of this Committee would further jeopardize the program. It seems to me that those entrusted with knowledge of this program must be committed to its protection.

Thank you, Mr. Chairman.

Senator Hatch. Thank you, Senator.

Senator Schumer?

Senator Schumer. Thank you, Mr. Chairman.

I just want to go back to where we left off and then I will move forward, and thank you, General Gonzales. I know it has been a long day for you, especially with all that bobbing and weaving. It is not so easy.

We talked before about the legal theory that you have under AUMF, and I had asked you that under your legal theory can the Government, without ever going to a judge or getting a warrant, search an American's home or office? I am not saying--well, can you give me an answer to that? Why wouldn't the same exact legal theory apply, that the Congress, in the resolution gave the President power he needed to protect America? Why is one different than the other, both at Fourth Amendment?

Attorney General Gonzales. Senator, I am not suggesting that it is different. Quite frankly, I would like the opportunity simply to--

Senator Schumer. I am sorry, if you could pull the mic forward.

Attorney General Gonzales. I'm sorry. I am not saying that it would be different. I would simply like the opportunity to contemplate over it and give you an answer.

Senator Schumer. And you will be back here so we can ask that, right?

Attorney General Gonzales. According to the Chairman.

Senator Schumer. Okay, good. If not, I would ask unanimous consent that Mr. Gonzales--General Gonzales be given time to answer that one in writing.

Senator Hatch. He said he would.

Senator Schumer. Good. Now, here is the next question I have. Has the Government done this? Has the Government searched someone's home, an American citizen, or office, without a warrant since 9/11, let's say?

Attorney General Gonzales. Sir, to my knowledge, that has not happened under the terrorist surveillance program, and I am not going to go beyond that.

Senator Schumer. I do not know what--what you said, under the terrorist surveillance program. The terrorist surveillance program is about wiretaps. This is about searching someone's home. It is different. So it would not be done under this surveillance program. I am asking you has it be done?

Attorney General Gonzales. But now you are asking me questions about operations or possible operations, and I am not going to get into that, Senator.

Senator Schumer. I am not asking you about any operation. I am not asking you how many times. I am not asking you where.

Attorney General Gonzales. If you ask me has that been done.

Senator Schumer. Yes.

Attorney General Gonzales. Have we done something.

Senator Schumer. Yes.

Attorney General Gonzales. That is an operational question in terms of how we are using our capabilities.

Senator Schumer. So you will not answer whether it is allowed and you will not answer whether it has been done. I mean is not part of your--in all due respect, as somebody who genuinely likes you--but isn't this part of your job to answer a question like this?

Attorney General Gonzales. Of course it is, Senator, and--

Senator Schumer. But you are not answering it.

Attorney General Gonzales. Well, I am not saying that I will not answer the question. I am just not prepared to give you an answer at this time.

Senator Schumer. All right. I have another one, and we can go through the same thing. How about wiretap under the illegal theory, can the Government, without ever going to a judge, wiretap purely domestic phone calls?

Attorney General Gonzales. Again, Senator, give me an opportunity to think about that, but of course, that is not what this program is.

Senator Schumer. It is not. I understand. I am asking because under the AUMF theory, you were allowed to do it for these wiretaps. I just want to know what is going on now. Let me just--has the Government done this? You can get back to me in writing.

Attorney General Gonzales. Thank you, Senator.

Senator Schumer. And one other, same issue. Placed a listening device, has the Government, without ever going to a judge, placed a listening device inside an American home to listen to the conversations that go on there? Same answer?

Attorney General Gonzales. Same answer, Senator.

Senator Schumer. But now I have another one, and let's see if you give the same answer here. And that is, under your legal theory, can the Government, without going to a judge--this is legal theory, I am not asking you whether they do this--monitor private calls of its political enemies, people not associated with terrorism, but people who they don't like politically?

Attorney General Gonzales. We are not going to do that. That's not going to happen.

Senator Schumer. All right. Next, different issue. Last week in the hearing before the Intelligence Committee, General Hayden refused to state publicly how many wiretaps have been authorized under this NSA program since 2001. Are you willing to answer that question, how many have been authorized?

Attorney General Gonzales. I cannot--no, sir, I'm not at liberty to do that. I believe--and of course, I have not been at all the briefings for the congressional leaders, and the leaders of the Intel Committee. I believe that that number has been shared, however, with members of Congress.

Senator Schumer. You mean the Chair of the Intelligence Committee or something? It is not a classified number, is it?

Attorney General Gonzales. It is a--I believe it is a classified number, yes, sir.

Senator Schumer. Here is the issue. FISA is also important to our national security, and you have praised the program, right?

Attorney General Gonzales. I couldn't agree more with you, Senator. It's very important.

Senator Schumer. Now, FISA makes public every year the number of applications. In 2004 there were 1,758 applications. Why can't we know how many under this program? Why should one be any more classified than the other?

Attorney General Gonzales. I don't know whether or not I have a good answer for you, Senator.

Senator Schumer. I do not think you do.

Attorney General Gonzales. The information is classified, and I certainly would not be at liberty to talk about it here in this public forum.

Senator Schumer. And I understand this isn't exactly your domain, but can you--I cannot even think of a rationale why one should be classified and one should be made routinely public. Both involve wiretaps. Both involve terrorism. Both involve protecting American security. And we have been doing the FISA one all along. I am sure if the--well, let me ask you this. If the administration thought that revealing the FISA number would damage security, wouldn't they move to classify it?

Attorney General Gonzales. I think maybe--of course, now I am just--I am going to give you an answer. Perhaps it has to do with the fact that with--FISA, of course, is much, much broader. We're talking about enemies beyond al Qaeda. We're talking about domestic surveillance. We are talking about surveillance that may exist in peacetime, not just in wartime. And so perhaps the equities are different in making that information available to Congress.

Senator Schumer. Would you support declassifying that number?

Attorney General Gonzales. Senator, I would have to think about that.

Senator Schumer. Okay, we will wait for the next round. That is another. We have a lot of questions to follow up on here.

Attorney General Gonzales. I look forward to our conversation.

Senator Schumer. Me too. Me too.

Abuses. This is when Frank Church was speaking at the hearing that Senator Kennedy, I think, talked about much earlier this morning, he said the NSA's, quote, capability at any time could be turned around on the American people and no American would have any privacy left. Such is the capability to monitor everything--telephone conversations, telegrams, it doesn't matter. There will be no place to hide.

Now it is 31 years later and we have even more technology. So there is the potential that Senator Church mentioned for abuse is greater.

So let me ask you these questions. I am going to ask a few of them so you can answer them together.

Have there been any abuses of the NSA surveillance program? Have there been any investigations arising from concerns about abuse of the NSA program? Has there been any disciplinary action taken against any official for abuses of the program?

Attorney General Gonzales. Senator, I think that--

Senator Schumer. Because--this gets to the nub of things--this is what we are worried about.

Attorney General Gonzales. Of course.

Senator Schumer. Most of us, I think all of us, want to give the President the power he needs to protect us. I certainly do. But we also want to make sure there are no abuses. So if there have been some abuses, we ought to know about it. And it might make your case to say, yeah, we found an abuse, or a potential abuse, and we snuffed it out.

Tell me what the story is.

Attorney General Gonzales. Well, I do not have answers to all of these questions. I would like to remind people that, of course, even in the area of criminal law enforcement, when you talk about probable cause, sometimes there are mistakes made, as you know.

Senator Schumer. No question. No one is perfect.

Attorney General Gonzales. The mistake has to be one that would be made by a reasonable man. And so when you ask have there been abuses, I can't--you know, these are all investigations, disciplinary action--

Senator Schumer. Yes, this is something you ought to know, if there has been any disciplinary action. Because I take it that would be taken--

Attorney General Gonzales. Not necessarily. I think the NSA has a regimen in place where they ensure that people are abiding by agency policies and regulations.

Senator Schumer. If I asked those two questions about the Justice Department, any investigations arising out of concerns about abuse of NSA surveillance or any disciplinary action taken against officials, in either case by the Justice Department, you would know the answer to that.

Attorney General Gonzales. I would probably know the answer that, to my knowledge, no.

Senator Schumer. Could you commit, when we come back, to tell us if there have been--you know, you can then go broader than what you know--more broadly than what you know now--

Attorney General Gonzales. In terms of what is going on at NSA or Justice?

Senator Schumer. NSA.

Attorney General Gonzales. Well--

Senator Schumer. I mean, as the chief law enforcement officer, it is still your job to sort of know what is going on in other agencies.

Attorney General Gonzales. Well, sir, but if we are not talking about-- Each agency has its own policies and procedures in place.

Senator Schumer. I am just asking you when you come back next time to try and find the answers.

Attorney General Gonzales. I will see what I can do about providing you additional information to your questions.

Senator Schumer. A little soft, but I will have to take it, I guess.

Thank you, Mr. Chairman.

Senator Hatch. Thank you.

Senator DeWine.

Senator DeWine. Thank you, Mr. Chairman.

Long day, Mr. Attorney General. Let me just ask you a few questions. We have had a lot of discussion today and you have referenced a lot to this group of 8, report to this group of 8. I just want to make a point. It is a small point, I guess, but the statutory authorization for this group of 8 is 50 USC 413b. When you look at that section, the only thing that it references as far as what this group of 8 does is receive reports in regard to covert action. So that is really what all it is. There is no--it does not cover a situation like we are talking about here at all.

So I just want to make that point. We all have a great deal of respect for these eight people. It is a different group of 8 at different periods of time. We have elected them, we have selected them, they are leaders of the Congress. But there is no statutory authority for this group other than this section has to do with covert operations. And this is not a covert operation as defined in the specific section.

Attorney General Gonzales. Senator, can I respond to you?

Senator DeWine. Sure.

Attorney General Gonzales. Because I had a similar question from Senator Feinstein and I don't know whether or not you were here or not.

First of all, again repeating for the record that of course the Chairman of the Senate Intel Committee and the Chairman of the House Intel Committee are both--

Senator DeWine. And I was here when she--

Attorney General Gonzales. Okay. Well, they both have communicated that we are meeting our statutory obligations. There is a provision that requires the President of the United States to ensure that agencies are complying with their notice requirements. The actual notice requirements, as I read it, are 413a(a) and 413b(b). And 413a(a) deals with non-covert action; 413b(b) deals with covert action. And both of them--

Senator DeWine. Mr. Attorney General, I don't have much time. I don't mean to be impolite.

Attorney General Gonzales. That is all right.

Senator DeWine. I listen to that and I respect your position on it. My only point was a small point.

Attorney General Gonzales. Yes, sir.

Senator DeWine. And that point simply is that when we referenced a group of 8, there is no statutory authorization for the group of 8 other than for a covert operation. I guess I am just kind of a strict constructionist, a kind of conservative guy, and that is how I read the statute. That is my only point. And I understand your legal interpretation. I respect that. But, you know, that is it. I don't see it any other way on that.

Let me ask you a couple of other questions that I wonder if you could clarify for me. One is the legal standard that you are using, that is being used by the NSA under this program for deciding when to conduct surveillance of a suspected terrorist. In your December 19th press conference you said that you must have a, and I quote, "reasonable basis to conclude" that one party to the communication is affiliated with al Qaeda. Speaking on Fox TV yesterday, General Hayden referred to the standard as "in the probable cause range."

Could you just define it for me? I know you have talked about it today, but we are hearing a lot of different definitions.

Attorney General Gonzales. To the extent there is--

Senator DeWine. You are the Attorney General. Just clarify it for me, pinpoint it, give me the definition that the people who are administering this every single day in the field are following.

Attorney General Gonzales. To the extent there is confusion, I must--we must take some of the credit for some of the confusion, because we have used different words. The standard is a probable cause standard. It is reasonable grounds to believe--

Senator DeWine. A probable cause standard. That doesn't mean it is--is that different than probable cause as we would normally learn that in law school?

Attorney General Gonzales. Not in my judgment.

Senator DeWine. Okay. So that means--

Attorney General Gonzales. I think it is probable cause. But it is not probable cause as to guilt--

Senator DeWine. I understand.

Attorney General Gonzales. --but probable cause as to a crime being committed. It is probable cause that a party to the communication is a member or agent of al Qaeda. The precise language that I would like you to refer to is a reasonable grounds to believe. Reasonable grounds to believe that a party to the communication is a member or agent of al Qaeda or of an affiliated terrorist organization.

Senator DeWine. So--

Attorney General Gonzales. It is a probable cause standard, in my judgment.

Senator DeWine. So probable cause.

Attorney General Gonzales. Is probable cause.

Senator DeWine. And so all the case law or anything else that we would learn throughout the years about probable cause, about that specific question, would be what we would look at and what the people are being instructed to follow.

Attorney General Gonzales. But again, it has nothing to do with probable cause of guilt or probable cause that a crime had been committed. It is about--

Senator DeWine. I understand. We are extrapolating that traditional standard over to another question.

Attorney General Gonzales. And the reason that we use these words instead of "probable cause" is because people relying upon the standard are not lawyers.

Senator DeWine. Let me follow up. I don't have much time. General Hayden described the standard as a softer trigger than the one that is used under FISA.

What does that mean?

Attorney General Gonzales. I think what General Hayden meant was that the standard is the same but the procedures are different, and that you have more procedures that have to be complied with under FISA. But the standards are the same in terms of probable cause. But there clearly are more procedures that have to be met under FISA, and that is what I believe General Hayden meant by "it's a softer trigger."

Senator DeWine. So it is more--it is a procedure issue, then. In other words, I have to go through more hoops on one, loops on the other. I mean, it is a difference what I have to go through, but my legal standard is the same. Is that what you are saying?

Attorney General Gonzales. It is a probable cause standard for both and, yes, sir, the--what has to--

Senator DeWine. It is the same standard.

Attorney General Gonzales. It is the same standard.

Senator DeWine. Different question, but--

Attorney General Gonzales. Different procedures.

Senator DeWine. --the same standard.

Final follow-up question on this. I believe you have said that the individual NSA analysts are the ones who are making these decisions. The people who are actually doing are making the decisions, obviously. What kind of training are these individuals given in regard to applying the standard?

Attorney General Gonzales. Well--

Senator DeWine. Are you involved in that or are you not involved in that?

Attorney General Gonzales. This is primarily handled by the General Counsel's Office at NSA. And as you know, they are very, very aware of the history of abuses. They care very much about ensuring that all the activities that are ongoing out at NSA are consistent with the Constitution and certainly consistent with the authorization by the President for this terrorist surveillance program.

Senator DeWine. So this is not something your Department is directly involved in?

Attorney General Gonzales. No, sir, I think it would be unfair to say that we are directly involved. We have provided some guidance, but I think it would be unfair to say that the Department of Justice has been intimately involved in providing training and guidance. This has been primarily--that, I think, aspect--I think it is fair to say that that responsibility has fallen primarily to the General Counsel's Office out at NSA.

Senator DeWine. Well, Mr. Attorney General, I am going to conclude at this point. I just go back to what I said this morning, and that is, you know, we have heard a lot of debate, even more debate than we had this morning, about these legal issues. People on different sides of these legal issues. I just really believe it is in the country's best interest, the President's best interest to want--terrorism's best interest, which is what we are all concerned about--some four years or so after this program has been initiated for the President to come to Congress and to get--for us, the Intelligence Committee, which is the committee that has jurisdiction, to take a look at this program, to get debriefing on the program, and then to see whatever changes in the law have to be made and to deal with it. I think you will be in a--the President will be in a much stronger position at this point to go forward, and it will be in the best interest of the country.

So I thank you.

Attorney General Gonzales. Thank you, Senator.

Senator Hatch. Thank you, Senator.

Senator Kennedy.

Senator Kennedy. Thank you, Mr. Chairman. And thank you, General Gonzales. I join all of those that paid tribute to you for your patience on this, and thank you for responding to these questions.

Just to pick up on what my friend and colleague, Senator DeWine, has mentioned. I am in strong agreement with that recommendation. It is bipartisan. I didn't have a chance to talk to Senator DeWine. I mentioned earlier in the course of our visit this morning that we had, I thought, extraordinary precedent with Attorney General Levi, Ed Levi and President Ford, where the members of this Committee, a number of us, went down to the Justice Department, worked with them. And they wanted to get it right. The issue was on eavesdropping, a very related subject matter, that they wanted to get it right. And then General Levi had a day and a half of where he listened to outside constitutional experts, because he wanted to get it right.

My very great concern is that we are not getting it right, maybe in terms of the NSA thinks that they are getting the information but what we are seeing now with the leaks and others, that there are many people out there that wonder whether they are going to face future prosecution, whether the court system is going to be tied up because of information that is gained as a result of the NSA taps that is not going to be permitted, and that we are going to have these known al Qaeda personnel that are going to be either freed or given a lesser sentence or whatever, and that they are less inclined to sort of spill the beans because, if they know that they are going away or worse, they will be better prepared to make a deal with the law enforcement authorities than if they think they can tie up the courts.

So in the FISA Act, as you well know, the 15 days that were included in there were included, as the legislative history shows, so that if they needed to have a broader context, it was spelled out in the legislative history, the administration would have seven days allegedly to make emergency recommendations and we would have seven days to act. Maybe that was too precipitous, but that was certainly the intent, the invitation at the time to recognize the time. And I think I believe very strongly that that is, as Senator DeWine has said, we want to get--we have uncertainty now. When you have those within your own department who wonder about the legality, the list of constitutional authorities that question the legality. When you have Professor Curtis Bradley, someone who had been part of the administration, the State Department, question the legality, I think this is a matter of concern.

I understand--I asked you--I didn't think I gave you a chance to answer, but you really didn't have a chance to test this out with outside constitutional authority, as I understand it.

Attorney General Gonzales. Sir, of course I wasn't at the Department when the program commenced. So certainly, from within the White House, I am not aware of any discussions generally or specifically. I don't think there would have been any specific discussions with outside experts. And I suspect, in fact I am fairly sure, there were not discussions with outside experts at the Department, although I don't know for sure.

Senator Kennedy. Well, we will have our chance and opportunity, hopefully, to find that out in further hearings. But it is impressive what was done previously and the coming together when the legislation was passed with virtual unanimity in the House and the Senate. And I think, as others have expressed, we want to give the President the power to get what is right in terms of protecting us, but we need, as we do on other issues, to have the kinds of checks and balance to make sure that it is done right.

Let me just--I have just a couple of other areas. I am not sure--you might have been asked about this, and if you can't answer it, you can't answer it, but since September 11th, has the President authorized any other surveillance program within the United States under his authority as Commander-in-Chief or under the authorization for use of military force in Afghanistan?

Attorney General Gonzales. Senator, I can't answer that question in terms of other operations.

Senator Kennedy. All right. On another issue, and I have heard from staff--I apologize for not being here through the whole session; we are dealing with the asbestos legislation on the floor at the time--

Attorney General Gonzales. Yes. Of course.

Senator Kennedy. --and I needed to go over to the floor. I am interested in the telephone companies that assist the Government in engaging in electronic surveillance face potential criminal and civil penalties if they disclose consumer information unlawfully. So they are protected from such liability if they receive a written certification from the Attorney General or his designee saying that, and I quote, no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.

So you understand that telephone companies can face criminal and civil liability if they provide wiretapping assistance in a way that is not authorized by statute?

Attorney General Gonzales. I do understand that, yes, sir.

Senator Kennedy. Have you provided a certification to the telephone companies that all statutory requirements have been met?

Attorney General Gonzales. Senator, I can't provide that kind of information.

Senator Kennedy. You can't answer that. And you couldn't even provide us with redacted copies.

So I guess we would assume that, since that is a requirement or otherwise that they will be held under the criminal code, and that is a requirement, one would have to assume that you have given them that kind of authority. But that--

Attorney General Gonzales. Sir, two points. There is a lot in the media about potentially what the President has authorized. Much of it is incomplete. Much of it is, quite frankly, wrong. And so you have this muddled picture that the President has authorized something that is much greater than what in fact he has authorized.

And I can't remember my second point.

Senator Kennedy. But your response to the earlier question about the range of different--

Attorney General Gonzales. Oh, I remember my second--if I could just-- My second point is, is that this--your question--again, I haven't--I think this is true; I don't want to give you the-- Well, maybe I shouldn't make this statement. I am sorry. Go ahead, sir.

Senator Kennedy. Well, we were looking at sort of the range of different programs. But I think that this--

I want to just mention, General, as someone that was here when we had the testimony, just quickly on the wiretaps, there was--prior to the time that J. Edgar Hoover used to appear, they used to lift all the wiretaps. They had 450 or 500 wiretaps, and they had 20 they day he testified, and then 500 the next day. No one is suggesting that that is what is happening, but that is really what many of us who have been on this Committee for some time have seen those abuses. No one is suggesting that, and we understand your reluctance in mentioning this, but we--this is an issue that has been around over some period of time.

I would just say in conclusion, Mr. Chairman, I am very hopeful. We want to have as much certainty on the program as possible. I think what we have seen out in the public now is the information that has been out there, almost--certainly weekly, is a result of concerned individuals in these agencies, hard-working Americans that are trying to do a job and are concerned about the legality of this job. And I think they are entitled to the protections that we ought to be able to provide for them. As someone who has been a member of this Committee, I think that this Committee has in the past and certainly would, recognizing the extraordinary sensitivity and the importance of it, do the job, do it right, and do it well. And then done so, I think we would have a different atmosphere and a different climate. And I think we would be able to get the kind of information that is going to be so important to our national security.

I hope that will be a judgment that you will consider, as Senator DeWine has mentioned and others have mentioned. I appreciate your testimony.

Thank you, Mr. Chairman.

Chairman Specter. Before proceeding to Senator Sessions, who is next on the Republican side--I will defer my turn until after Senator Sessions has had his turn--I think this is a good time to make an announcement--Senator Kennedy made this suggestion earlier today--about the Committee's intentions with respect to renewing the Voting Rights Act, especially propitious time with the death of Coretta Scott King. We have been talking about hearings. We are going to move to renew the Voting Rights Act this year, if we possibly can, in advance of the 2007 date. We have been laboring under a very, very heavy workload, which everybody knows about, and we will be scheduling those hearings early on. They have to be very comprehensive, provide an evidentiary base, and that is a matter of great concern, really, to everybody on the Committee.

Senator Kennedy?

Senator Kennedy. I want to thank the Chair. We have had a chance to talk about this at other times. And I particularly appreciate his sensitivity, as many of us are going down to the funeral for Coretta Scott King. I think it is an important statement and comment that her legacy will continue. So I thank the Chair. I know we have broad support. My friend Senator Leahy has been a strong supporter. Others here, Senator Biden--I look around this Committee. It is a very, very important legislation. In the time that we inquired of General Gonzales, he had indicated the full support of the administration on this. We will look forward to working with you.

I thank the Chair for making that announcement.

Chairman Specter. Thank you, Senator Kennedy.

Senator Sessions.

Senator Sessions. Thank you, Mr. Chairman.

I would like to offer for the record a letter from Mr. H. Brian Cunningham, who served for six years with the CIA and the Department of Justice in President Clinton's administration and for a time President Bush's administration, in which he defends the actions of the terrorist surveillance program.

I would also join with the Chairman in welcoming Ms. Deborah Burlingame here. She has been here all day. Her brother was a pilot who lost his life in the plane that crashed into the Pentagon. I think her presence today is a vivid reminder of the human cost that can occur as a result of negligence or failure of will or failure to utilize the capabilities that are constitutionally legal in this country. We have a responsibility to make sure that we do those things that are appropriate and legal to defend this country. It is not merely an academic matter. We have had some good discussions here today. But it is beyond academics. It is a matter of life and death. And we have lost a lot of people, over 300-- nearly 3,000 people have no civil rights today. They are no longer with us as a result of a terrorist attack. Thank you, Ms. Burlingame, for coming and being with us today.

We talked about the inherent power of the President. I think there has been a remarkable unanimity of support for the inherent power of the President to do these kind of things in the interest of national security. And I know, post-Aldrich Ames, as you pointed out when I asked you about it, Mr. Gonzales, Attorney General Gonzales, that laws were changed with regard to that. But in fact, Jamie Gorelick, the Deputy Attorney General in the Clinton administration testified in defense of an warrantless search of Aldrich Ames's home and a warrantless search of the Mississippi home of a terrorist in the Aldrich Ames case. She testified that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes.

Now, that sounds to me like that she was saying that that is an inherent constitutional power. I don't understand it any other way. Would you?

Senator Biden. Would the Senator yield for a question? What year is that? I am sorry.

Senator Sessions. This would have been after the Aldrich Ames case, 1994-1995.

Senator Biden. Thank you.

Senator Sessions. It was before the statute was changed by the Congress. But she did not discuss it in that context. Her context was that it is the inherent power of the President. And she went on to say, "and the rules and methodologies for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities."

And in addition to that, Judge Griffin Bell, who served as a Federal judge for a number of years and was Attorney General under a Democratic President, Jimmy Carter, when the FISA Act was passed, acknowledged that while the bill did not recognize the President's inherent power to conduct electronic surveillance, he said this: "This does not take away the power of the President under the Constitution. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it, as the case may be. It is in the Constitution, whatever it is."

And then he went on to say a little later, when asked about the inherent power of the President to order electronic surveillance without first obtaining a warrant, former Attorney General Griffin Bell testified, "We can't change the Constitution by agreement." Or by statute, I would add.

A little later, he said when asked if he thought the President has, quote--he was asked this question--Does the President have "the inherent right to engage in electronic surveillance of an American citizen in this country?", Judge Bell responded, "I do. I think he has a constitutional right to do that, and he has a concomitant constitutional duty to do it under certain circumstances."

So I don't know all the answers to what the powers are here. There are a lot of different opinions. I would say this. You have almost been criticized some today for not going further, not surveilling phone calls within our country. Some on the other side have criticized you--are apparently surprised you didn't assert that authority. But the President, I think, acted narrowly and within what he thought would be appropriate, given the constitutional and statutory structure and after having informed eight of the top leaders in the United States Congress.

Would you comment on that?

Attorney General Gonzales. Well, it is a very narrow authorization. And again, I want to repeat what I said earlier in the hearings in terms of--I want to assure you that while domestic-to-domestic is not covered under the terrorist surveillance program, we are using all the tools available, including FISA, to get information regarding those kinds of communications. I mean, if there are other ways to do it that are permitted under the Constitution, we are going to try to get that information, so very, very important.

Senator Sessions. Well, thank you. I would just observe that I think this system was working. It was a narrow program that the President explained to congressional leaders. He had his top lawyers in the Department of Justice and the White House review its constitutionality and he was convinced that it was legal. He narrowly constrained it to international calls, not domestic calls, and al Qaeda-connected individuals. And he also did it with the one group that he has concluded was responsible for 9/11, al Qaeda, the group that this Congress has authorized him to have hostilities against, to go to war against. And they declared war on us even before 9/11. That is the one group, not other groups that might have hostile interests to the United States like Hizbollah or any other Colombian group or terrorist group around the world. That is what he authorized to occur. So I think he showed respect for the Congress, not a disrespect.

And General Gonzales, other groups that may have violent elements within them are not authorized to be surveilled through this terrorist surveillance program. Isn't that correct?

Attorney General Gonzales. Senator, under the President's terrorist surveillance program, again as I have indicated, what we are talking about today is people, members or agents of al Qaeda or related--of al Qaeda or related terrorist organizations. That is what we are talking about. And I think General Hayden, I believe, testified before the Intel Committee that there are professionals out at NSA and, I presume, from other branches of the intel community that provide input as to what does that mean to be sort of related or working with al Qaeda.

Senator Sessions. Well, let me just conclude with this point. I think the system was working in that way. We were conducting a highly classified important operation that had the ability to prevent other people from being killed, as Ms. Burlingame's brother was killed and several thousand others on 9/11. I believe that CIA Director Porter Goss recently, in this statement that the revealing of this program resulted in severe damage to our intelligence capabilities, is important to note. And I would just like to follow up on Senator Cornyn's questions, General Gonzales, and ask you to assure us that you will investigate this matter, and if people are found to have violated the law, that the Department of Justice will prosecute those cases when they reveal this highly secret, highly important program.

Attorney General Gonzales. Senator, of course we are going to investigate it. And we will make the appropriate decision regarding subsequent prosecution.

Senator Sessions. Will you prosecute if it is appropriate?

Attorney General Gonzales. We will prosecute when it is--if it is appropriate, yes, sir.

Senator Sessions. Thank you.

Chairman Specter. Thank you, Senator Sessions.

Senator Biden.

Senator Biden. Thank you very much.

General, how has this revelation damaged the program? I am almost confused by it. I mean, it seems to presuppose that these very sophisticated al Qaeda folks didn't think we were intercepting their phone calls. I mean, I am a little confused. How did it damage itself?

Attorney General Gonzales. Well, Senator, I would first defer to the experts on the Intel Committee who are making that statement, first of all. I am just a lawyer, and so when the Director of the CIA says this will really damage our intel capabilities, I would defer to that statement.

I think, based on my experience, it is true. You would assume that the enemy is presuming that we are engaged in some kind of surveillance. But if they are not reminded about it all the time in the newspapers and in stories, they sometimes forget, and you are amazed at some of the communications that exist. And so, but when you keep sticking it--putting it in their face that we are involved in some kind of surveillance, even if it is unclear in these stories, it can't help but make a difference, I think.

Senator Biden. Well, I hope you and my distinguished friend from Alabama are right that they are that stupid and naive, because we are much better off if that is the case. I got the impression from the work I have done in this area that they are pretty darned sophisticated. They pretty well know. It is a little like when we talk about--when I say you all haven't--not you personally--the administration has done very little for rail security. They have done virtually nothing. And people say, Oh, my lord, don't tell them, don't tell them there are vulnerabilities in the rail system. They'll know to use terror. Don't tell them that tunnel was built in 1860 and has no lighting, no ventilation.

I mean, I hope they are that stupid.

Attorney General Gonzales. Sir, I think you can be very, very smart and be careless.

Senator Biden. Well, okay, but if that is the extent of the damage, then I hope we focus on some other things, too.

Look, I would like to submit for the record a letter to the--it has probably already been done--to Senator Specter and Leahy from former Secretary Jamie Gorelick. She makes a very basic point. I don't want to debate it at this time. She said the Aldrich Ames case is about physical search. FISA didn't cover physical searches, as my distinguished friend from Alabama knows. At the time they conducted the search, FISA did not cover physical searches.

And then she went on to say, My testimony did not address whether there would be inherent authority to conduct physical searches if FISA were extended to cover physical searches. After FISA was extended to cover physical searches, to my knowledge FISA warrants were sought.

So, I mean, let's compare apples and apples, and oranges and oranges.

Let me ask a few other basic questions. Because for me, you know, I have real doubts about the constitutionality, as others have raised here. I used to have a friend who used to say, you know, you have to know how to know. You have to know how to know. And we don't know.

Now, you are telling me and the rest of us that the Director of CIA says we have been damaged. Well, the former Director told us that we were going to be greeted with open arms. You know, that they had weapons of mass destruction. Those were honest mistakes. I mean, for me to accept the assertion made by a single person is something I would consider but is not dispositive.

Let me ask you this question. Do you know--and you may not--do you know how many of these wiretaps and/or e-mail intercepts have resulted in anything?

Attorney General Gonzales. Well--

Senator Biden. Any criminal referral, any--

Attorney General Gonzales. Without getting into specifics, Senator, I can say that the Director of the FBI said this has been a very valuable program. And it has helped identify would-be terrorists here in the United States, and it has helped identify individuals providing material support for terrorists. General Hayden has said this has been a very successful program, that but for this program we would not have discovered certain kinds of information. General Hayden also said that this program has helped protect and prevent--I think those were his words--attacks both here and abroad. These folks are the ones that are paid to make these kinds of assessments. I am not.

Senator Biden. Have we arrested those people? Have we arrested the people we have identified as terrorists in the United States?

Attorney General Gonzales. Sir, when we can use our law enforcement tools to go after the bad guys, we do that.

Senator Biden. No, that is not my question, General. You said that, you cited the assertions made by Defense Department, by General Hayden, by the FBI that this has identified al Qaeda terrorists. Have we arrested them?

Attorney General Gonzales. Senator, I am not going to go--I am not going to go into specific discussions about--

Senator Biden. I am not asking for specifics, with all due respects.

Attorney General Gonzales. Well, in terms of how that information has been used and the results of that information.

Senator Biden. Well, I hope we arrested them if you identified them. I mean, it kind of worries me because you all talk about how you identify these people and I have not heard anything about anybody being arrested. I hope they are not just hanging out there like we had these other guys hanging out prior to 9/11. I don't think you would make that mistake again.

Can I ask you, again, how is this material that proves not to-- A suspected al Qaeda terrorist calls from Abu Dhabi American citizen in Selma, Alabama. Turns out that when you do the intercept, the person on the other end, from Abu Dhabi, wasn't a terrorist. Understandable mistake. And it turns out the person in Selma wasn't talking to a terrorist. What do you do with that conversation that has now been recorded?

Attorney General Gonzales. What I can say, Senator, is that we do have--there are minimization procedures in place. You and I had this conversation before about the minimization procedures that may exist with respect to this program.

Senator Biden. That may exist?

Attorney General Gonzales. Meaning--

Senator Biden. Either they do or they don't. Do they exist?

Attorney General Gonzales. There are minimization procedures that do exist with this program, and they would govern what happens to that information.

Senator Biden. Does anybody know what they are?

Attorney General Gonzales. Yes, sir, the folks out at NSA who are actually administering this program.

Senator Biden. Have they told anybody in the Congress? Have they told any court?

Attorney General Gonzales. Sir, I do not know that, the answer to that question.

Senator Biden. I guess maybe you all don't have the same problem I have. If, in fact, there are minimization procedures and they are being adhered to, no problem. If, in fact, the people being intercepted are al Qaeda folks and they are talking to American citizens, no problem. But how do we know? I mean, doesn't anybody get to look at this ever? Doesn't a court retrospectively get to look at it? Doesn't, you know, the royalty within the Senate get to look at it, you know, these two, four, or eight people? I mean, doesn't somebody look at it? Or, you know, the Cold War lasted 40 years. This war is likely to last 40 years. Is this for 40 years we have got to sit here and assume that every President is just, well, we know old Charlie, he is a good man, we are sure he wouldn't do anything wrong? And we know no one in the intelligence community would every do anything wrong. We have a history of proving that never occurred. And we know no one in the FBI will ever do anything wrong. That is clear. That never occurred.

I mean, is there some place along the line that somebody other than an analyst, who we don't know but we know he is asserted to be an expert on al Qaeda, is there somebody other than that person who is ever going to know what happened? And whether or not there is, the next President maybe be less scrupulous. Maybe he or she will be engaged in data-mining.

Attorney General Gonzales. Senator, as I indicated in my opening remarks, of course, the Inspector General at NSA, he has the responsibility to ensure that the activities out of this program are done in a way that is consistent with the President's authorization, including the minimization requirements.

Senator Biden. Okay. This reminds me of the Supreme Court hearing. What goes into the President making the decision on reauthorization every 45 days? Does anybody come and say, Mr. President, look, we have done 2,117 wiretaps or 219, 60 percent of them had some impact or only 1 percent has an impact, and we think--I mean, what--or is it automatic? I mean, what kind of things does a President look at other than we still have al Qaeda out there?

Attorney General Gonzales. Sir, it is not automatic. As I also indicated in my opening statement, the President receives information from the intelligence community about the threat. The threat is carefully evaluated as to whether or not we believe al Qaeda continues to be a continuing threat to the United States of America.

Senator Biden. So as long as it is, the program, so that is the criteria, is al Qaeda a threat? Not is the program working, but is al Qaeda a threat? Is that the criteria?

Attorney General Gonzales. Well, of course not. If we do not have a tool, a lawful tool that is effective, why would we use it. We only use a tool if it is effective?

Senator Biden. Thank you, General.

Attorney General Gonzales. Mr. Chairman, could I ask for a short break?

Chairman Specter. Granted.

Attorney General Gonzales. Thank you, Mr. Chairman.

[Recess 4:44 p.m. to 4:52 p.m.]

Chairman Specter. The Judiciary Committee hearing will resume. We have four more Senators who have not completed their next round who are on the premises, so it may be that we can finish today. Other Senators have looked toward another round, so let me negotiate that between today and some date in the future to see if it is necessary to ask you to come back, Mr. Attorney General. And I had thought about limiting the time to 5-minute rounds, but we are going to be here at least until about 5:30. So let's go ahead with the full 10 minutes, and I will yield at this time to Senator Graham?

Senator Biden. Mr. Chairman, parliamentary inquiry. I do have other questions. I am not asking they be asked today or even tomorrow, but if we end today, which I think makes a lot of sense--the General has been very generous, and his physical constitution has been required to be pretty strong here today, too. Is it likely if after you survey us, after we close down today, that you may very well ask the General back for more questions from us in open session?

Chairman Specter. Senator Biden, I would like to leave that open. Senator Leahy said that he was looking forward to another round, which is where we were when he left.

Senator Biden. Okay.

Chairman Specter. I thought we would have a number of Senators who wouldn't have finished a second round, so Attorney General Gonzales would have had to come back for a second round. But it may be that others will have further questions, or it may be that on some of our other hearings we will have matters that we want to take up with the Attorney General. And the Attorney General has stated to me his flexibility in coming back, so let's--is that correct, Mr. Attorney General?

Attorney General Gonzales. I try to be as helpful as I can to you, Mr. Chairman.

Chairman Specter. I take that to be a yes.

Senator Biden. Ten more seconds. The only reason I ask, I, like you, want to go to the floor and speak on the asbestos bill that is up, and I didn't know whether I should stay here for a third round or--

Chairman Specter. I can answer that. You should stay here.

[Laughter.]

Senator Biden. I oppose the Chairman's position on asbestos. I shouldn't have asked that question. I withdraw the question, Mr. Chairman.

Chairman Specter. I expect to go to 9 o'clock, Senator Biden. You are going to miss very important materials if you leave.

Senator Graham?

Senator Graham. Thank you, Mr. Chairman.

Mr. Attorney General, we will see if we can talk a little more about this constitutional tension that is sort of my pet peeve, for lack of a better word.

I would just echo again what Senator DeWine said. Instead of another round at another time, I would love to engage in a collaborative process with the administration to see if we can resolve this tension. I want to talk to you exclusively about inherent power and your view of it and the administration's view of it, and share some thoughts about my view of it.

The signing statement issued by the administration on the McCain language prohibiting cruel, inhumane, and degrading treatment, are you familiar with the administration's signing statement?

Attorney General Gonzales. I am familiar with it, Senator.

Senator Graham. What does that mean?

Attorney General Gonzales. The entirety of the statement, Senator?

Senator Graham. Well, I guess to me I was taken back a bit by saying, notwithstanding, it was sort of an assertion that the President's inherent authority may allow him to ignore the dictates of the statute. Does it mean that, or did I misunderstand it?

Attorney General Gonzales. It may mean that this President--first of all, no

President can waive constitutional authority of the executive branch.

Senator Graham. My question is very simple but very important. Is it the position of the administration that an enactment by Congress prohibiting the cruel, inhumane, and degrading treatment of a detainee intrudes on the inherent power of the President to conduct the war?

Attorney General Gonzales. Senator, I think--I don't know whether or not we have done that specific analysis.

Senator Graham. Can I ask you this question then?

Attorney General Gonzales. Yes.

Senator Graham. Is it the opinion of--your opinion and the administration's position without the force resolution that FISA is unconstitutional in the sense it intrudes on the power of the President to conduct surveillance at a time of war?

Attorney General Gonzales. I think that question has been raised a couple times today. I have indicated that that then puts us into the third part of the Jackson analysis. I have also indicated that these are difficult questions.

Senator Graham. And I will accept that as an honest, sincere answer, because they are difficult.

Let's get back to my scenario about the military member who has a detainee under their charge. They get an order from the commander-in-chief or some higher authority to do certain techniques. The justification is that we need to know about what is going to happen in terms of battlefield developments. We believe this person possesses information. And those techniques are expressly prohibited by prior statute under the authority of the Congress to regulate the military. That is another classic moment of tension. What do we tell that troop? If they called you as a lawyer and they said, "I got the order from my commander," maybe even from the President, "to engage in five things, but I have been told there is a statute that says I cannot do that passed by Congress, what should I do?" what would your answer be to that person?

Attorney General Gonzales. I don't know if I can give that person an immediate answer. I think that is the point that you are making. To put our military in that kind of position, that is a very difficult place to be.

Senator Graham. Thank you for that. That is absolutely the point I have been trying to make for a year and a half. I want to give that troop an answer that we all can live with, and let me take this just a little bit further.

The FISA statute in a time of war is a check and balance, but here is where I think I am your biggest fan. During the time of war, the administration has the inherent power, in my opinion, to surveil the enemy and to map the battlefield electronically, not just physical but to electronically map what the enemy is up to by seizing information and putting that puzzle together. And the administration has not only the right but the duty, in my opinion, to pursue fifth column movements. And let me tell folks who are watching what a fifth column movement is. It is a movement known to every war where Americans, citizens, will sympathize with the enemy and collaborate with the enemy. It has happened in every war. And President Roosevelt talked about we need to know about fifth column movements.

So to my friends on the other side, I stand by this President's ability inherent to being Commander-in-Chief to find out about fifth column movements. And I don't think you need a warrant to do that.

But here is my challenge to you, Mr. Attorney General. There will come a point in time where the information leads us to believe that citizen A may be involved in a fifth column movement. At that point in time, where we will need to know more about citizen

A's activity on an ongoing basis, here is where I part. I think that is where the courts really come in. I would like you and the next Attorney General and the next President, if you have that serious information that you need to monitor this American citizen's conduct in the future, that they may be part of a fifth column movement to collaborate with the enemy. I want a check and a balance and here is why: Emotions run high in war, and we put a lot of people in prison who just look like the enemy and never did anything wrong, just as loyal an American as you or I. But it would be very easy in this war for an American citizens to be called up by the enemy and labeled as something they are not. It would be very easy, in my opinion, if you are a business person dealing in the Mideast who happened to be an American citizen, the business deal goes bad, that bad things could happen to you.

I would just like the administration to entertain the idea of sitting down with Senator DeWine and others to see if we can find a way at some point in the process of monitoring fifth column movements to have a check and balance system that not only would strengthen the Commander-in-Chief's role, it will give guidance to the people fighting the war. You will have Congress on board. You will be stronger in courts, and the enemy will be weaker.

How does that proposition sit with you?

Attorney General Gonzales. Senator, the President has already said that we would be happy to listen to your ideas.

Senator Graham. Okay. But you do understand my inherent authority argument, my concern with that argument, because taken--the next President may not be as sensitive to this limited role of the Government. Really, Mr. Attorney General, you could use the inherent authority argument of a Commander-in-Chief at a time of war almost wipe out anything Congress wanted to do.

Attorney General Gonzales. See, I disagree with that, Senator. I really meant it when I said earlier that in time--

Senator Graham. Give me a situation where the Congress could regulate or trump the inherent power argument in time of war.

Attorney General Gonzales. I think Congress has a powerful check on the Commander-in-Chief. It is through the purse.

Senator Graham. If the Congress decided to limit treatment or interrogation techniques of a detainee, would the President have to honor that? Is that part of our authority under the Constitution to regulate the military? Do we have the authority to tell the military you will not do the following things? Would that intrude on the inherent power of the President to run the military?

Attorney General Gonzales. The question is whether or not this is an interference of the day-to-day command functions of the Commander-in-Chief or does it fall within that clause of section 8 of Article I, which says that Congress--

Senator Graham. Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?

Attorney General Gonzales. I am not prepared to say that, Senator. I think that that is--I think you can make an argument that that is part of the rule the Government--

Senator Graham. Mr. Attorney General, if we cannot do that, if we cannot during a time of war regulate the behavior of our troops, then really we have no power in a time of war. And that is the point here. I think we share power.

Attorney General Gonzales. I agree. I agree that power is shared in time of war.

Senator Graham. I think we share a purpose of winning the war.

Attorney General Gonzales. No question about that.

Senator Graham. But we need to get together so the people on the front lines who are pulled and torn--if the Bybee memo, Mr. Attorney General had become the policy, there would have been people subject to court martial. And in your good judgment, you repealed that. But I can assure you, Mr. Attorney General, if the Bybee memo's view of how you handle a detainee and what is torture and what is not, if it had been implemented, it would have violated the Uniform Code of Military Justice, and our guys could have gone to jail. And in your good judgment, you repealed that.

I am asking for you to use that good judgment again and advise our President to come to this Congress and let us sit down and work through these constitutional tensions, because we do not need tension among ourselves. We need unanimity.

Thank you for your service to our country.

Attorney General Gonzales. Thank you, Senator.

Chairman Specter. Thank you very much, Senator Graham.

Senator Durbin?

Senator Durbin. Thank you.

Attorney General, you have said that the safeguards for this program, this terrorist surveillance or domestic spying program, include the fact that they are reviewed by career professionals--I believe you referred to the National Security Agency, perhaps other agencies--and that there is a 45-day review as to whether you will continue the program.

Where did the 45-day review requirement come from?

Attorney General Gonzales. Senator, that really sort of arose by, quite frankly, schedules in terms of having folks be in a position to provide recommendations and advice as to whether the program can continue. There is nothing magical about the 45 days.

Senator Durbin. I am not worried about the magic so much as is there a statute that drives this? Is there a legal requirement of a 45-day review?

Attorney General Gonzales. We felt that it was--I think it helps us in the Fourth Amendment analysis in terms of is this a reasonable search, the fact that it is reviewed periodically, and I think it is more sort of by happenstance that it really has come out to be approximately every 45 days.

Let me just also mention that when I talked about the review out at NSA, there are monthly meetings, as I understand it, unconnected with this 45-day review, in which senior officials involved in this program sit down and evaluate how the program is being operated. That is a process that is totally independent of this 45-day review process.

Senator Durbin. But who chooses the professionals that evaluate this program?

Attorney General Gonzales. Senator, I am led to believe--I don't know for sure, but I am led to believe that they are people--I am assuming senior officials at NSA identify people at NSA who have al Qaeda experience, al Qaeda expertise, knowledge about al Qaeda tactics and aims, and, therefore, are in the best position to evaluate whether or not a person who is on the call is, in fact, a member or agent of al Qaeda or an affiliated terrorist organization.

Senator Durbin. Which gets to my point. This so-called safeguard--and it has been referred to as a check and balance--is literally the administration talking to itself. People within the administration meet within their offices and decide about the civil liberties and freedoms of those who are going to be subjected to this surveillance. That is a significant departure from the ordinary checks and balances of our Government, is it not, that all of this is being decided within the same executive branch?

Attorney General Gonzales. I don't know if I would characterize it that way. I think that there is a lot of--there is intelligence that is collected by the National Security

Agency where they have control over this information, they have internal rules and regulations, they are subject to minimization requirements. Those are classified. Those have been shared, as I understand it, with the Intel Committee, if you are talking about Executive Order 12333. And so I don't know that it is so unique to this program.

Senator Durbin. Well, let me just say, if you want a wiretap, as Attorney General you know what you have to do.

Attorney General Gonzales. Yes, sir.

Senator Durbin. You have to go to another branch of our Government. You have to get a warrant. That is in criminal cases--

Attorney General Gonzales. In a criminal cases, Title III, that is right.

Senator Durbin. Terrorist cases, you know that FISA applies. And now when it comes to these wiretaps, or whatever they may be, this surveillance, whatever it may be, you don't go to another branch of Government. You meet within your own branch of Government, and that I think is a significant difference.

Here is what it comes down to. You know, there is a general concern here as to whether or not the scope of what we are talking about, what it might be. And I know you are limited in what you can tell us. But I also know that Michael Chertoff, the Secretary of Homeland Security, recently said the NSA was "culling through literally thousands of phone numbers and trying to sift through an enormous amount of data very quickly." You have assured us that this is not a dragnet.

But I think the thing that it continues to come back to is whether innocent Americans, ordinary Americans are going to have their e-mails and their phone calls combed through. And you may shake your head and say, oh, we would never do that. But, Attorney General, no one is looking over your shoulder. You are not going to anyone, as you would with another wiretap request, to determine whether or not it is a reasonable request or it goes too far or, in fact, is targeted rather than random.

I talked to you about Mr. Fleischer, who is sitting out here, who asked the very basic question: Have I been victimized by this program? Have I been the subject of this program? He couldn't get an answer. He has had communications overseas. The fact that he is sitting here today is a suggestion that he is not worried about what the outcome might be, but he is worried about his freedoms and his liberties. There is no one for him to speak to. When he contacts your administration, they say, Neither confirm nor deny. So there is no check and balance here. There is nothing to protect his freedom or liberty or the freedom or liberty of a lot of innocent people who wonder if you are going too far. That I think is why many of us are absolutely stunned that this administration won't come to Capitol Hill and ask us on a bipartisan basis for help with this FISA Act, if, in fact, it does create a problem.

I voted for the PATRIOT Act. All but one of the Senators in the Senate voted for the PATRIOT Act. It isn't as if we are not ready to cooperate with you. We would feel better about your conduct and the conduct of this administration if there was a law that you followed. We are not asking you to spell out the operational details, but we are asking you to have at least a FISA Court judge, someone from another branch of Government, taking a look at what you are doing. There is some assurance under that situation for 28 years that there is a check and balance.

Do you understand why the blank check that you have asked for causes so much heartburn?

Attorney General Gonzales. Senator, I do understand concern about a blank check. I don't believe that is what we have here. In your comments, you have talked about going around the law, going around FISA. That is not the case here. We believe we are acting consistent with the requirements of FISA.

I don't know about the comments that Secretary Chertoff made. General Hayden has been out very publicly talking about what this program is about, and it is not about--it doesn't sound like it is a kind of program that Secretary Chertoff is talking about. But I would be very interested in studying his remarks.

This is a very narrowly tailored program.

Senator Durbin. But how do I know that? There is no one--other than your good word today, there is no one that can tell me: I have looked at this program, trust me, Senator, you can tell Mr. Fleischer and your constituents in Illinois not to worry; we are not going to comb through the records of innocent Americans. There is no one for me to turn to.

Attorney General Gonzales. I don't know if it is proper to ask you a question, Senator, but I am going to ask you a question.

Senator Durbin. Go ahead.

Attorney General Gonzales. If we were to brief you into the program, how would anyone be assured that you would protect the rights of ordinary citizens? Because we have briefed congressional leaders, and so they know what we are doing and--

Senator Durbin. They are sworn to secrecy, are they not?

Attorney General Gonzales. This is a very classified, highly classified program.

Senator Durbin. They are sworn to secrecy.

Attorney General Gonzales. But they also--

Senator Durbin. If they found the most egregious violation of civil rights taking place in this program, they are sworn not to say one word about it.

Attorney General Gonzales. Senator, I have got to believe that all of us--we take an oath of office, and if we honestly believe that a crime is being committed, then we would do something about it.

Senator Durbin. How would they? I have been on the Intelligence Committee, and I can tell you that when you are briefed with classified material--I sat in briefings not far from here, just a few feet away, and listened to what I thought was very meager evidence about weapons of mass destruction before the invasion of Iraq. Based on that, I voted against it. But I couldn't walk outside that room, until it became public much later, and say this administration was at war within when it came to this issue.

Attorney General Gonzales. Senator, I think we are letting Members of Congress off the hook easily by saying that if they get briefed into a secret program and they believe it is against the law, that they can't do anything about it. I think you have an obligation, quite frankly, when you take that oath of office, if you believe that conduct is, in fact, unlawful, I think you can do something about it.

Senator Durbin. Well, let's talk about one Congressman--Congresswoman in this case, who has spoken out, Congresswoman Jane Harman. She has been briefed on the program, and she has said publicly you can use FISA, you don't need to do what you are doing, you don't need to go through this warrantless process.

So from her point of view, I think she has gone as far as she can go. That is it.

Attorney General Gonzales. Senator, I don't think we have ever said that we could not use FISA in particular cases. But the time it would take to get a FISA application approved would mean that we may lose access to valuable information.

Senator Durbin. You will not come before us and tell us how to change the law to overcome that problem. That is what I find absolutely inexplicable.

The last thing I would like to do, Mr. Chairman, or whoever is now presiding, we have had several references to Mrs. Burlingame, who is here, and I thank her for joining us today and for her statements to the press. I would also like to acknowledge the presence of Monica Gabrielle and Mindy Kleinberg, who were also in the Families of Victims of 9/11. They are here today, and they have made a statement for the record. I will read the last sentence and ask that this be part of the record. "Retaining our civil liberties and our cherished democracy in the face of a looming terrorist threat is the only way we will win this war on terror." And I ask that this statement be made a part of the record.

Senator Graham. [Presiding.] Without objection.

[Laughter.]

Senator Durbin. Thank you very much, Chairman Graham. Thank you, General.

Attorney General Gonzales. Thank you, Senator.

Senator Cornyn. Attorney General Gonzales, Chairman Specter had to step out, but he asked me to proceed after Senator Durbin, and I am happy to do that so we can move on.

If an employee of the National Security Agency has a concern about the legality of what they are being asked to do, are they authorized to have a press conference or to otherwise leak that information to outside sources?

Attorney General Gonzales. Senator, I think there are laws that prohibit the disclosure of classified information. I think there might be other ways that would certainly be more appropriate.

Senator Cornyn. Let me suggest one to you. In 1998, Congress passed the Intelligence Community Whistleblower Protection Act which provides in part that an employee of the DIA, the National Imagery and Mapping Agency, the National Reconnaissance Office, or the National Security Agency or a contractor of any of those agencies who intends to report to Congress a complaint about the legality of the program, that they can report that to the Inspector General of the Department of Defense or to the leadership of the Intelligence Committees in the United States Congress.

Would you consider that to be a more appropriate place for a so-called whistleblower to report their concerns?

Attorney General Gonzales. Yes, sir, I would.

Senator Cornyn. Well, at the very least, there would be an opportunity for those officials to evaluate the complaint of this individual, and we wouldn't risk the disclosure of highly classified information or programs that are collecting intelligence.

Attorney General Gonzales. No question about it. The danger or problem of going to the media as an initial matter is that you have some people, I think, whose motivation I think can be questioned in terms of why are they doing that. And when they go out and talk to the public about a highly classified program, they harm the national security of this country. I think Congress realized that when they passed the statute that you just described to try to provide an avenue for those people who legitimately are concerned about perhaps wrongdoing, that they have an avenue to pursue, to express their grievances, and to do so in a way that we don't jeopardize the Nation's secrets.

Senator Cornyn. Let me ask you---the last area I want to ask you about--you have endured through a long day, and I know we are trying to wrap up. I have read a lot about the debate on this program and trying to understand why it is the administration believed that it needed to exercise the authority that it was granted by Congress under the authorization for the use of military force and perhaps the President's power under the Constitution, over and above what FISA would ordinarily provide.

First of all, if NSA wants to listen to communications between terrorists abroad that are wholly located in some other country, they can do that without a warrant, can they not?

Attorney General Gonzales. Whether or not FISA applies depends on the answer to basically four key questions: Who is the target? Primarily we are concerned about whether or not the communication involves a U.S. person. Where is the target? Primarily we are concerned about whether or not the person is in the United States. Where is the acquisition taking place? And then, finally, what are you trying to acquire? Is it wire communication? Is it radio communication?

And so the answer as to whether or not FISA would apply with respect to a particular communication primarily depends upon answering those kinds of questions.

Senator Cornyn. Thank you for the precise answer. But as a general matter, if the persons are located in a foreign country and they are not American citizens and the communications are taking place within that foreign country, then FISA does not require the issuance of a warrant.

Attorney General Gonzales. As a general matter, if you are talking about non-U.S. persons outside the United States, and certainly if the acquisition is outside the United States, we don't have to worry about FISA.

Senator Cornyn. Isn't it true that the problem that this program has tried to address, the gap in FISA that it tries to address, is that in order to get a warrant under FISA, the Government must have grounds to believe the U.S. person it wishes to monitor is a foreign spy or terrorist? And even if a person is here on a student or tourist visa or no visa, the Government cannot get a warrant to find out whether they are a terrorist. It must already have reason to believe that they are one.

Attorney General Gonzales. Well, certainly to obtain an order from the FISA Court, the court has to be satisfied that there is probable cause to believe that the target is either a foreign power or an agent of a foreign power and probable cause to believe that the facility being targeted is actually being used or about to be used by a foreign power or an agent of a foreign power.

Senator Cornyn. Stated another way, the problem with FISA as written is that the surveillance it authorizes is unusable to discover who is a terrorist as distinct from eavesdropping on known terrorists. Would you agree with that?

Attorney General Gonzales. That would be a different way of putting it, yes, sir.

Senator Cornyn. You would agree with that statement?

Attorney General Gonzales. Yes, sir.

Senator Cornyn. So the particular program that has been debated here and the authority that the National Security Agency has to conduct it is filling a gap that exists in our intelligence-gathering capabilities. Is that an accurate description?

Attorney General Gonzales. I think we quickly realized after the attacks of 9/11 that the tools that we had traditionally been using were insufficient, and this was the opinion of the intelligence community, and that is why the President authorized this program, was because we did have vulnerabilities in our access to information about the enemy.

Senator Cornyn. Finally, with regard to exclusivity, there have been some on the Committee who have asked whether the statement that Congress has made in the FISA statute that it is the exclusive means to gather foreign intelligence--whether that is necessarily a binding obligation when it comes in conflict, if it does, with the Constitution.

I know you have cited the doctrine of, I guess, constitutional avoidance or--did I get that correct?

Attorney General Gonzales. The canon of constitutional avoidance, yes, sir.

Senator Cornyn. Thank you.

I mean, this has more than just hypothetical applications. For example, are law enforcement authorities in this country authorized to shoot down a plane that they believe is carrying illegal drugs or committing some other crime?

Attorney General Gonzales. Well, Senator, I guess I would have to think about that. If you were asking whether the military had the authorization to shoot down an airplane--

Senator Cornyn. I am asking about law enforcement authorities other than the military.

Attorney General Gonzales. Well, let me just say that we do not expect our law enforcement offices to be perfect in their judgment when you are talking about the Fourth Amendment and searches. The standard is probable cause; it is the totality of the circumstances.

But it is very, very important to remember we are talking about the judgment from the eye of a professional officer, and this is what the courts have said. That is why in the terrorist surveillance program we have the determination made by someone who is experienced regarding al Qaeda tactics and communications. He is making that decision from the view of--like the police officer on the beat in terms of what is reasonable, what satisfies a probable cause standard.

Senator Cornyn. Well, making this very personal and real, if a plane is heading toward the Capitol, don't you believe that the use of force resolution and Article II of the Constitution authorize the President to have United States military forces shoot that plane down, if necessary?

Attorney General Gonzales. I believe so, sir, and I quite frankly believe that the President had the authority prior to the authorization to use military force. I think even though proponents, pro-Congress group of scholars who believe very strongly in the power of Congress during a time of war--even they acknowledge that with respect to initiation of hostilities that only Congress can declare war, but, of course, military force can be initiated by the President if the United States has already been attacked or if there is an imminent threat to the United States.

And so I think there are strong arguments that would support the notion that the President of the United States, even before the authorization to use military force was passed by Congress, after we had been attacked already, of course, could then use military force to repel an additional attack.

And we have to remember, of course, that in the days and weeks following 9/11, there were combat air patrols. So the President was exercising his authority even before the authorization to use military force to have the military in place to protect us from another attack.

Senator Cornyn. Thank you.

Chairman Specter. Thank you, Senator Cornyn.

Senator Kohl.

Senator Kohl. Thank you very much.

Just a couple of questions, Mr. Attorney General. Can you tell us how many U.S. citizens have had communications intercepted, listened to or recorded by this program since it started?

Attorney General Gonzales. Senator, I wish I could share more information with you, but that information is classified and I can't disclose that.

Senator Kohl. How many Americans have had their phone conversations recorded or their e-mails intercepted without a court order? Any idea?

Attorney General Gonzales. Again, Senator, you are asking me about the operations of this program and I really can't get into it. I have outlined today that this is a very narrowly tailored program that has been authorized by the President of the United States, and we have taken great pains to try to protect the privacy interests of every American. But as the President has said, even if you are an American citizen, if you are talking to a member of al Qaeda, we would like to know why.

Senator Kohl. You have talked at length today and over the course of the past month about how the program has to be reauthorized every 45 days, and you have lauded that as a strong check and a balance on the potential for abuse. News reports suggest that one of the authorizations has led to changes in the program.

Could you tell us what those changes were?

Attorney General Gonzales. Well, again, Senator, you are asking me about operational details of the program and I really can't get into operational details.

Senator Kohl. All right. The New York Times reported that in interviews with current and former law enforcement officials, the flood of NSA tips that came from this program led them to expend considerable resources in following leads and diverted some agents from work that they had viewed as more productive.

Law enforcement officials interviewed said that the program had uncovered no active plots in the United States. One said that, quote, "The information was so thin and connections were so remote that they never led to anything," unquote. Another said, quote, "It affected the FBI in the sense that they had to devote so many resources to tracking every single one of these leads, and in my experience they were all dry leads," unquote.

So is there a concern that this program is not collecting enough worthwhile information, and does this suggest that the net was perhaps too large and that you ensnared too many Americans who were not, in fact, involved in any terrorist activities?

Attorney General Gonzales. Thank you for that question, Senator. I am aware of these stories. First of all, it is true that Director Mueller feels very strongly that we cannot afford to not investigate one way or the other or to check out every particular tip. We have an obligation to do that.

I think General Hayden has already indicated publicly that immediately following the attacks of 9/11, he exercised his own independent authorities, which do exist for the NSA, to gather up information, gather up more information than he would normally do--again, these are under existing authorities, lawful authorities--and to share all that information with the FBI.

And so you had a situation where the NSA was gathering up more information than it normally does and then sharing more of that information with the FBI. We quickly discovered that that was not very efficient because of the fact that it required the FBI to utilize their resources. And so that process or that procedure stopped, and so I think the stories that you are referring to do not relate to the terrorist surveillance program about which I am testifying today.

Senator Kohl. I thank you very much, and I thank you, Mr. Chairman.

Chairman Specter. Thank you, Senator Kohl.

Senator Brownback.

Senator Brownback. Mr. Chairman, thank you.

General, an interesting line of questioning, and I want to pursue going after a FISA warrant with some specificity with you because I want to understand this process better. I think you have covered it in bits and pieces and today, and I have been in and out at times, but I want to go into it in some depth.

Before I do that, I want to note in the New York Post online edition of February 6th, just really in response to the last question here, "A 2004 NBC report graphically illustrated"--and I am reading from this--"what not having the program cost us four-and-a-half years ago. In 1999, the NSA began monitoring a known al Qaeda switchboard in Yemen that relayed calls from Osama bin Laden to operatives all over the world. Surveillance picked up the phone number of a Khalid in the United States, but the NSA didn't intercept those calls, fearing it would be accused of 'domestic spying.' After 9/11, investigators learned that Khalid was Khalid Al-Midhar, then living in San Diego under his own name, one of the hijackers who flew American Airlines Flight 77 into the Pentagon. He made more than a dozen calls to the Yemen house where his brother-in-law lived. NBC News called this, quote, 'one of the missed clues that could have saved 3,000 lives.'" It was a very real thing and a very real thing for us today, and one that had we been operating it effectively prior to 9/11 could have possibly saved thousands of lives.

Mr. Attorney General, I certainly appreciate the need for expediency in carrying out electronic surveillance, and you mentioned that getting a FISA warrant is often a time-consuming procedure. Could you go into some specificity for me so I can hear this on how long that process generally takes? To the degree you can, without revealing information that is classified, how long does this process taken?

Attorney General Gonzales. Well, it varies. What I can say, Senator, is that we have, for a variety of reasons, some applications that have been pending for months, quite frankly. Sometimes, that is a result because we can't get sufficient information from the FBI or NSA in order to satisfy the lawyers at the Department that, in fact, we can meet the requirements of the FISA Act.

Sometimes, it is a situation where priorities--with each passing day, renewals expire on very important programs, so we then have to prepare a renewal package to submit to the FISA court, and that means that other FISA applications that our lawyers have been working on kind of get pushed to the side as they work on the more important cases. So there are a variety of reasons why it takes some time to get a FISA application approved. If you want me to get into a more down-in-the-weeds discussion--

Senator Brownback. I would.

Attorney General Gonzales. Okay.

Senator Brownback. I would like to get, you know, what is it that takes so much time in these FISA applications.

Attorney General Gonzales. Well, of course, we can't begin surveillance just based on a whim by someone, say, at the FBI. There has to be a reason to believe that all of the standards of the FISA statute can be satisfied. We have to know that a FISA court judge is going to be absolutely convinced that this is an agent of a foreign power, that this facility is going to be a facility that is going to be used or is being used by an agent of a foreign power.

The things that I have to approve I have to--when I sign an application, we have to identify the target. We have to set forth the circumstances and the reasons that I believe that the target is a foreign power or an agent of a foreign power. I have to set forth the circumstances for why I believe that this facility is being used or is about to be used by a foreign power or agent of a foreign power.

We have to set forth in the application the minimization requirements that we intend to use. We have to set forth in the application with specificity the type of information we are hoping to get and the type of facilities or communications that we are targeting. So those are just some of the things that I have to include in the application.

The application has to be accompanied by a certification that is signed by a senior official of the administration who has national security responsibility. Normally, it is the FBI Director. It could be the Director of the CIA. So that person has to certify that, in fact, this is foreign intelligence information. That person has to certify that a significant purpose of the surveillance is for foreign intelligence purposes. That person has to certify that normal investigative techniques or means are not otherwise available, and there are some other provisions that have to be certified.

So all those conditions, requirements have to be met even before I authorize verbally an emergency authorization, and it takes time. Even in a perfect world, even in an ideal case, it is going to take a period of time. And I am not talking about hours. We are normally talking about days, weeks, on the more complicated cases sometimes months.

Senator Brownback. And this would include even these sorts of operations we have read about about data-mining operations? Would that include those sorts of operations, or are those totally a separate type of field?

Attorney General Gonzales. I am not here to talk about that. Again, let me just caution everyone that you need to read these stories with caution. There is a lot of mixing and mangling of activities that are totally unrelated to what the President has authorized under the terrorist surveillance program. So I am uncomfortable talking about other kinds of operations that are unrelated to the terrorist surveillance program.

Senator Brownback. These would be strictly ones where you are going after a targeted set of individuals that have gone through--

Attorney General Gonzales. Under FISA?

Senator Brownback. Yes, under the FISA applications.

Attorney General Gonzales. We have to remember, of course, this is--

Senator Brownback. Along the lines of what you have just described in some detail, this is the sort of information you are seeking before you are going after anything under FISA.

Attorney General Gonzales. In every case--and, of course, we always have to remember that we are not just talking about al Qaeda when you are talking about FISA. You are talking about agents of other countries, and it is not limited only to international communications under FISA; it is domestic communications. So we want to get it right, of course.

As I said earlier in response to another question, the fact that we have such a high approval rate by the FISA court isn't an indication that the FISA court is a rubber stamp. It is more, I think--

Senator Brownback. Your process internally.

Attorney General Gonzales. --proof that we have got a legitimate process. We take this very seriously.

Senator Brownback. Well, I don't want to drag on the questions. You have been here a long period of time. I do want to encourage us that as the war on terrorism wears on, because it is going to wear on for a period of time, that we do have a check and balance system in place that is workable so that you can get the type of information that you need and that we need to protect the country, but at the same time can protect the civil liberties of the Nation, and you are doing everything you can in that regard.

I just think as we look on forward, this is going to be a key policy factor of how we move forward and sustain support for the war on terrorism over the period of various administrations and possible length of time that this could well take.

Thank you for being here. Thank you, Mr. Chairman.

Chairman Specter. Thank you, Senator Brownback.

Mr. Attorney General, you have held up remarkably well for a long day. I have deferred my second round until everyone else has concluded a second round because, as Chairman, I have stay. So I thought I would go last in any event. So it is just you and me. When we came in today, there was a long line in the hallway waiting to get in, and now only a few people are here and the Senators' bench is pretty well cleared.

I want to come back to the issue as to whether the resolution authorizing the use of force of September 14 gives the President congressional authority to undertake electronic surveillance. I said candidly at the outset that I did not think that it did, and let me explore with you a number of questions I have that I am interested in the administration's response.

Let me start first with the signing statement of President Carter when he signed the Foreign Intelligence Surveillance Act of 1978 on October 25th. He said, in part, quote, "The bill requires for the first time a prior judicial warrant for all electronic surveillance for foreign intelligence or counter-intelligence purposes in the United States, in which communications of U.S. persons might be intercepted. It clarifies the executive's authority to gather foreign intelligence by electronic surveillance in the United States. It will remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism."

So when you talk about what happened in Washington's time on intercepting messages or unsealing envelopes, or what happened in Lincoln's time or what happened in Franklin Delano Roosevelt's time, or when you talk about a number of the circuit court opinions giving broad presidential authority saying that the gathering of intelligence was his prerogative without respect to the Fourth Amendment, that is before Congress acted.

Now, a signing statement is subject to a number of limitations. If the President in a signing statement seeks to distinguish his view from what the Congress has passed, I think it is entitled to very little, if any, weight. Where the President, as President Carter did, squarely backs what the Congress has done, then you have a concurrence of the Congress and the President, and you really have very forceful, very plain, very strict language in the Foreign Intelligence Surveillance Act.

How do you counter what President Carter has said that it applies to all U.S. persons and covers all foreign intelligence by electronic surveillance in the United States?

Attorney General Gonzales. Well, of course, I don't believe that it is possible for any President to waive for future Presidents any constitutional authority, any authority given to a President under the Constitution. I haven't read that statement in a while. I don't think in the statement President Carter says I have no inherent authority remaining in this area.

Finally, I would just simply remind the Chair--I think this was mentioned earlier by one of the Senators--his Attorney General in hearings in connection with the legislation--I think it was before a committee of the House--talked about the fact that this is--and I am paraphrasing here--this in no way takes away from the President's inherent constitutional authority, this legislation. So that is how I would respond to your question.

Chairman Specter. Well, Mr. Attorney General, that is not the Jackson test which you have subscribed to, but I am going to come back to that in just a minute.

In your responses to my question about statutory interpretation--and we have covered the line that it is disfavored to have a repeal by implication, and you have the statute of FISA specific: no interception of electronic communication without a warrant, which is very specific. And then you have the generalized statement of the September 14th resolution which, at best, would be a repeal by implication, which is disfavored.

But then we come upon another very important provision of statutory construction and that is the one which relates to specific language takes precedence over more generalized pronouncements. And in your answer you said, quote, "It is not clear which provision is more specific," close quote. Well, that is false on its face.

If you have the statute saying no electronic surveillance without a warrant, there is no doubt that that is more specific than the September 14th resolution, is there? How can you disagree with those plain words?

Attorney General Gonzales. By that answer, I only meant to convey, Senator, that the resolution is more specific with respect to al Qaeda, certainly. And, of course, the FISA statute is not limited only to al Qaeda. As the answer also indicates, we had sort of this same--or this same discussion occurred in the Hamdi decision. We had the same situation. We had a specific statute, 18 U.S.C. 4001(a), and it said no American citizen could be detained, except as otherwise provided by Congress, or maybe otherwise provided by a statute by Congress.

And the Supreme Court said that, nonetheless, you had a broader authorization than the authorization to use military force and that would satisfy the statute, even though you had a specific statute with respect to detention and you had a broad authorization.

Chairman Specter. Did the Supreme Court deal with that statute?

Attorney General Gonzales. 4001(a)? That was the statute at issue, yes, sir, in the Hamdi decision, of course.

Chairman Specter. Did the Supreme Court deal with it specifically?

Attorney General Gonzales. Sir, in Hamdi, Mr. Hamdi was contesting that that statute prohibited the President of the United States from detaining him because he was an American citizen. And the Supreme Court said, well, okay, you are right, you have the specific statute. But you have also got this broad grant of authority by the Congress and that is sufficient to allow the President of the United States to detain you even as an American citizen.

Chairman Specter. Well, I think you are dealing with very different circumstances when you talk about a soldier on the field as opposed to a United States person whose conversations are being electronically surveilled, but let me move on here. It may very well be that you and I won't agree on this point.

The resolution of September 14th did not add the words "in the United States" after the words, quote, "appropriate force." That was rejected to give the President broad authority not just overseas, but in the United States. Isn't that a clear indication of congressional intent not to give the President authority for interceptions in the United States?

Attorney General Gonzales. Sir, I don't know where that record is to reflect that that actually happened. I think the CRS, Congressional Research Service, said that in the legislative history--and I may be wrong; it is late, but I believe that they said that there is no record to indicate that that ever occurred, quite frankly.

As I indicated in my opening statement, I think the American public, I think our soldiers, I think our courts ought to be able to rely upon the plain language passed by the Congress. And there is no question that the resolution talked about the President of the United States protecting Americans both here and abroad.

And we have to put it in context. We were just attacked here in this country from folks within our country communicating within our country. It is hard to imagine, as smart as you are, that you wouldn't have provided the President of the United States the grant of authority to at least deal with a similar kind of threat to the one we just experienced.

Chairman Specter. The law involving wiretapping prior to the enactment of the Foreign Intelligence Surveillance Act had the preceding sentence, quote, "Nothing contained"--referring to the law--"shall limit the constitutional power of the President to obtain foreign intelligence information deemed essential to the security of the United States."

When the Foreign Intelligence Surveillance Act was passed, that language was stricken. So by all customary standards of statutory interpretation, FISA, the Foreign Intelligence Surveillance Act, changed that 180 degrees, isn't it?

Attorney General Gonzales. There is no question, if you look at the legislative history and the record, that Congress intended to try to limit whatever the President's inherent authority existed. But there is also from my review of the record a clear indication that some members of Congress were concerned about the constitutionality of this effort.

I think the House conference report talked about the fact this is what we are trying to do. It may be the Supreme Court may have a different view of this. And I am paraphrasing here, but that is a remarkable acknowledgement by a member of Congress that, gee, is what we are doing here really constitutional?

No question about it that certainly Congress intended to cabin the President's authority, but also Congress when they passed FISA included Section 109, which is the main criminal provision in FISA that talks about you can't engage in electronic surveillance under criminal law, except as otherwise provided by statute. And so I think we have to apply a fairly plausible reading of the statute in that way in order to avoid, in my judgment, a tough constitutional question as to whether or not does the Congress have the constitutional authority to pass a statute that infringes upon the President's inherent authority as Commander-in-Chief to engage in electronic surveillance of the enemy during a time of war.

Chairman Specter. I don't think you can use the principle of avoiding a tough constitutional conflict by disagreeing with the plain words of the statute.

Attorney General Gonzales, when members of Congress heard about your contention that the resolution authorizing the use of force amended the Foreign Intelligence Surveillance Act, there was general shock.

Attorney General Gonzales. Sir, we have never asserted that FISA has been amended. We have always asserted that our interpretation of FISA which contemplates another statute--and we have that here in the authorization to use force--that those complement each other. This is not a situation where FISA has been overridden or FISA has been amended. That has never been our position.

Chairman Specter. Well, that just defies logic and plain English. FISA says squarely that you can't have electronic surveillance of any person without a warrant. And you are saying, when you tag on another statute which is in the penal provision, that those words in FISA are no longer applicable, that there has been a later statutory resolution by Congress which changes that.

Attorney General Gonzales, I think we come back to the Jackson formula, and my judgment, with some experience in the field--and I was starting to tell you how shocked people were when we found out that you thought that what we had done on the resolution of September 14th authorized electronic surveillance. Nobody had that in the remotest concept.

Senator Graham has articulated in very forceful terms the consequence of the administration making this interpretation that before you ever get the authority from Congress again, we are going to go through every conceivable exception we can think of or we just may not give the authority, because you come back to relying on inherent authority. And you may have the inherent authority, you may have the Article II authority. But I do not think that any fair, realistic reading of the September 14th resolution gives you the power to conduct electronic surveillance.

That brings me to really what Jackson said, and it is so wise it is worth reading again, quote, "When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers of Congress over the matter."

Now, my reading of this situation legally is that there has been an express will of Congress to the contrary and that when the President seeks to rely on his own inherent power, then he is disregarding congressional constitutional power.

Then Jackson goes on, quote, "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." And I think that is what you are doing. You are disabling Congress from acting on the subject, which Congress did, signed by the President.

And then Justice Jackson goes on for really the critical language, "Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution." That is what we are doing here today and we are going to do it a lot more. And then these are the critical words more so than any of the others, quote, "For what is at stake is the equilibrium established by our constitutional system." And there is a very high value placed on the equilibrium of our constitutional system. That means everything.

Attorney General Gonzales. I agree, Senator.

Chairman Specter. Okay. Well, finally, we found something to agree upon.

Now, on the issue of the inherent power of the President, I believe the President has very substantial Article II power; I believe he does. And we have to be concerned as a life-or-death matter about al Qaeda, we really do, and I subscribe to the good faith of the President as to what he has done here and I have said that publicly. And I subscribe to your good faith in what you have done here.

I just hope that there will be oversight somewhere along the line, perhaps in the Intelligence Committee, to get into the details, the interstices, the semicolons, as to what you are doing because I know you can't do that here. But I don't think you can measure the President's inherent authority under Article II without knowing what you are doing. You just cannot do it, because that authority is not unlimited, and you have agreed to that.

Attorney General Gonzales. I agree with that.

Chairman Specter. It is not a blank check.

Attorney General Gonzales. That is correct, sir.

Chairman Specter. So it has to be within the parameters of being reasonable. The cases, the circuit opinions, emphasize the reasonable parameters. And the Supreme Court hasn't ruled on this issue yet. It is an open question, and the circuit opinions are mostly, if not all, pre-dating the Foreign Intelligence Surveillance Act.

So I just hope the Intelligence Committee is going to come down to brass tacks here, and I hope it is the committee and not just the Ranking and Chairman. Both Senator Roberts and Senator Rockefeller have expressed forcefully their concern about not being lawyers and not having an opportunity to present these issues to lawyers to get a legal interpretation to square the facts up to what the law is. They just have been very explicit in their own limitations.

So in conclusion--the two most popular words of any presentation--I hope you will give weighty thought to taking this issue to the Foreign Intelligence Surveillance Court, lock, stock and barrel. Let them see the whole thing and let them pass judgment, because if they disagree with you, it is the equilibrium of our constitutional system which is involved.

The al Qaeda threat is very weighty, but so is the equilibrium of our constitutional system.

Attorney General Gonzales. I agree, Senator.

Chairman Specter. Security is very weighty, but so are civil rights.

Thank you very much, Attorney General Gonzales. You have established very forcefully your fortitude and stamina here today, even if we disagree with portions of your case.

Attorney General Gonzales. Thank you, Mr. Chairman.

Chairman Specter. That concludes the hearing.

[Whereupon, at 5:56 p.m., the Committee was adjourned.]